86 1556 (1)



No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

UNITED AMERICAN TELECASTERS, INC.,
*Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION,
*Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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18 pp

## QUESTIONS PRESENTED FOR REVIEW

Whether an administrative agency is required to follow its own precedent in dealing with applicants who come before it seeking licenses.

Whether an agency, by not disclosing the full basis for its decision, deprives an applicant of legal due process rights.

## LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed, except those named in the caption, hereto, are:

KIST Corp.
Bethel Broadcasting, Inc.
Sunland Communications Company
Riverside Family Television

United American Telecasters, Inc., the petitioner herein, has no parent company, no subsidiaries and is not the affiliate of any corporation.

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

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No.

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UNITED AMERICAN TELECASTERS, INC.,
*Petitioner*
v.

FEDERAL COMMUNICATIONS COMMISSION,
*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit which appears as appendix C is unreported. The opinion of the Federal Communications Commission which appears at appendix D is reported at 102 FCC 2d 288 (1985). The opinion of the Commission's Review Board which appears at appendix E is reported at 99 FCC 2d 173 (1984). The Initial Decision of Administrative Law Judge Joseph Chachkin which appears at appendix F is reported at 99 FCC 2d 201 (1983).

## JURISDICTIONAL STATEMENT

Petitioner, United American Telecasters, Inc. (United), hereby petitions for a writ of certiorari to review the Memorandum of the United States Court of Appeals for

the District of Columbia Circuit, dated October 15, 1986 which affirmed a holding by the Federal Communications Commission that petitioner was not financially qualified to be a Commission licensee. On December 1, 1986, petitioner timely filed a petition for rehearing by the Court of Appeals *en banc*. By order dated December 29, 1986, petitioner's request for rehearing *en banc* was denied.

## JURISDICTION

Jurisdiction of this court is invoked under the provisions of Title 28, United States Code, Section 1254.

## STATUTE INVOLVED

Communications Act of 1934, As Amended

Construction Permits

Section 319. (a) Requirements. No license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant.

47 United States Code, Section 319(a).

## STATEMENT OF THE CASE

The United States Court of Appeals for the District of Columbia affirmed a *Memorandum Opinion and Order*, 102 FCC 2d 288 (1985), by which the Federal Communications Commission (Commission) granted an application of the Sunland Communications Company (Sunland) for a new commercial television station at Riverside, California and denied the competing applications, including that of petitioner, United.

In denying the application of United, the Commission affirmed the holding of its Review Board that United was not financially qualified because the bank on which United was relying for the funds necessary to operate and construct its proposed station had a legal loan limit which was less than the loan contemplated and United had not demonstrated the willingness of other banks, whose participation would be necessary if the loan was to be made, to participate in the loan. *Decision*, 99 FCC 173 (1983). This *Decision*, by the Review Board, affirmed a holding in the *Initial Decision* in this case that United was not financially qualified. 99 FCC 2d 201 (1983).

Subsequent to the release of the *Initial Decision*, and while this case was still before the Commission's Review Board, the bank on which United had relied went out of existence. United thereafter amended its application to reflect a new source of funding and to provide other evidence demonstrating its financial qualifications. United's new financial showing was not considered by the Review Board on the ground that it would be disruptive of the administrative process to accord an applicant a post-hearing opportunity to establish its financial qualifications.

Under comparative considerations, the *Initial Decision* granted the application of Sunland. The Review Board reversed this determination and preferred the applica-

tion of KIST Corp. The Commission reversed, restoring the preference for Sunland.

United here seeks review of the Review Board's holding as affirmed below that it could not be comparatively considered because it is not financially qualified to be a Commission licensee. If United, whose principals are almost entirely persons of Asian heritage and all of whom reside within the area which would be served by the station, had been comparatively considered, it would have been entitled to a comparative preference over the other applicants and would have been awarded the right to construct its new television station at Riverside, California.

Jurisdiction of the United States Court of Appeals for the District of Columbia Circuit to review cases from the Federal Communications Commission is provided by Title 28 United States Code, Section 2342 and Title 47 United States Code, Section 402(b).

## REASONS FOR ALLOWANCE OF WRIT

### I. The decision of the agency is so contrary to its own precedent as to be arbitrary and capricious.

The Federal Communications Commission is authorized by the *Communications Act of 1934, as amended* to award construction permits to applicants for new broadcast stations. Section 319(a) of the Act provides that an application for a construction permit "shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character and the *financial*, technical, and other ability of the applicant to construct and operate the station. . ." (emphasis supplied). The instant case involves mutually exclusive applications to construct and operate a new television station at Riverside, California. One of these applicants, petitioner United American Telecasters, Inc. (United), was found financially unqualified to construct and operate its proposed station. For this reason, its application was not considered com-

paratively and United did not receive the construction permit at issue.

This case presents the Supreme Court of the United States with an opportunity to make clear that regulatory agencies, if their actions are to stand, must act in a consistent fashion. Indeed, as the Court of Appeals stated in *NLRB* v. *Mall Tool Co.*, 119 F.2d 700, 792 (7th Cir., 1941), the need for "[c]onsistency in administrative rulings is essential" and "to adopt different standards for similar situations is to act arbitrarily." See also *Crosthwait* v. *FCC*, 189 U.S. App. D.C. 392, 398, 584 F.2d 550, 556 (D.C. Cir. 1978) wherein the court reminded the Federal Communicttions Commission that agency action cannot stand when it is "so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion." (Footnote deleted).

In the instant case, the Commission has acted in an arbitrary and capricious manner, inconsistent with its past precedents, in two separate and distinct rulings with regard to United's financial qualifications. First, the Commission held that United was not financially qualified because it had not demonstrated at hearing that other banks would participate in its bank loan and, second, it refused to consider amendments to United's application reflecting new sources of funding proffered after the bank on which United was relying at hearing went out of existence. As will be shown, the Commission had never before required that an applicant demonstrate the willingness of other banks to participate in a loan nor has it generally refused to accept amendments to meet a financial issue where the need to amend is the result of an action beyond the control of the applicant and the amendment is otherwise unobjectionable.

In demonstrating its financial qualifications, an applicant is only required by the Commission to show that it has a "reasonable assurance" that if its application is granted it will have the funds necessary to effectuate its

proposal. Moreover, the Commission may not thereafter elevate this "reasonable assurane" standard to something more stringent. *See Multi-State Communications*, 192 U.S. App. D.C. 1, 590 F.2d 1117 (D.C. Cir. 1978), and *Las Vegas Valley Broadcasting Co.*, 191 U.S. App. D.C. 71, 589 F.2d 594 (D.C. Cir. 1978). Here, United not only obtained a bank loan letter that indicated that its loan would be syndicated, but also proffered testimony at hearing from bank officials that they were aware that the loan would require the participation of other banks. In concluding that this showing was inadequate, the Review Board explicitly recognized the unprecedented nature of its holding, stating that "the precedent relative to syndication loans may be written somewhat unevenly. *See Washington Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1362-1364 (Rev. Bd. 1983). . .", 99 FCC 2d at 178-179. The phrase "written somewhat unevenly" is a mere euphemism for "inconsistently". In the *Washington Christian* case, which the Board cites, the Board held that it was "unduly harsh" to disqualify an applicant because its bank loan letter was for an amount greater than the bank's lending limit. 94 FCC 2d at 1364. Significantly, the Board's characterization of the Commission's precedent as uneven was not disputed by the Commission when it affirmed the Board's decision. It is patently unfair and arbitrary to find an applicant disqualified on the basis of a standard enunciated in precedent which the Commission itself admits is "written somewhat unevenly". Such arbitrary treatment of an applicant is precisely what the Court of Appeals warned the Commission about in the *Crosthwait* case and is patently contrary to the public interest because it destroys the public's faith in the administrative process.

Even during the appeal in this case, the Commission has been unable to cite any precedent under the reasonable assurance standard that would require an applicant to supply evidence that other banks would be willing to

participate in its principal bank's loan. The case most on point is *CBS, Inc.*, 49 FCC 2d 1214, 1229 (1973), where the Review Board held that where a contemplated bank loan would exceed a bank's statutory limit, an applicant must show "*either* that the . . . [bank] . . . contemplates and is willing to arrange to have other banks share in the loan, *or* that other banks would be willing to participate in extending funds to the full extent necessary . . ." (emphasis supplied). United met the first part of this test, *i.e.*, it showed that its bank was willing to syndicate the loan, but still it was found unqualified.

On appeal, the Court of Appeals found that "[t]he agency decisionmakers [sic] appropriately required evidence that the proposed lender be both willing and able to furnish the necessary funds." United submits that this test was met within the reasonable assurance context. United's bank was willing to lend United the necessary funds and it recognized its need to syndicate the loan to meet its commitment. This is all that agency decision makers at the Commission have ever required of applicants. See *CBS Inc.*

It must be remembered that at the time an application is pending before the Commission, an applicant is only seeking a reasonable assurance from a lender that if its application is granted at some time in the future, it will have the funds necessary to finance its proposal. At the point in time when applicants are negotiating with banks for such assurances nothing is definite. To require banks and/or applicants to seek agreements from other banks for a loan which may never be made is unreasonable on its face and goes beyond the reasonable assurance which the Commission says it requires.

Finally, the Commission's disqualification of United is contrary to the Commission's expressed intention to eliminate rules which create economic barriers to applicants seeking broadcast licenses. Under today's policies, for example, applicants need only certify to their financial

qualifications and they are deemed financially qualified. See *Revision of Form 301*, 50 RR 2d 381, 382 (1981). In revising form 301, the Commission noted that where financial problems exist, "the vast majority of applicants have been able to amend their applications to remedy any perceived deficiency" (*Id.*). In short, the Commission itself has apparently perceived that stringent scrutiny of applicants' financing is superfluous in determining whether applicants will be able to construct and to operate as proposed.[1]

Regardless of whether United was found financially qualified at hearing, once the bank on which it was relying ceased to exist, United's amended financial showing should have been considered. Both the Review Board and the Court of Appeals held that to consider United's new financial showing would have disrupted and retarded the orderly conduct of the Commission's business. While it is true that an amendment may not be accepted if the proceeding would be disrupted by requiring further hearings, the Commission, in the past, has found applicants financially qualified based on amendments submitted after the close of the hearing, without requiring further hearing. In *Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 462 (1982), for example, the Commission received a financial amendment submitted after the hearing and found the applicant financially qualified, even though its own Broadcast Bureau argued that acceptance of the amendment would require further hearings which would disrupt the proceeding. Such treatment contrasts sharply with that accorded United, whose amendments were ignored.

Here, aside from the claim that acceptance of its amendment would be disruptive, United's compliance

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[1] Petitioner does not intend by this discussion to suggest that the Commission has abandoned its financial requirements. It does reserve the right to require applicants to produce additional financial information where warranted.

with the Commission requirements for acceptance of amendments has not been questioned and there was no reason to deny United's amendments. See the standards set forth in *Erwin O'Connor Broadcasting*, 22 FCC 2d 140 (Rev. Bd. 1970).

The Court of Appeals also found that "the Review Board acted within the bounds of its discretion in refusing United's tender of a substitute lender." To the extent, however, that the Board may exercise discretion in such matters, where there is clear precedent on a matter, that precedent should not be ignored without explanation. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, 83 S.Ct. 239, 245 (1962). Moreover, here the Board's "discretion" may mask an *ad hoc* approach to decision making rather than the reasoned decision making which is required of all agency decision makers.

As a final matter, it is simply incredible to believe that petitioner could not raise the funds necessary to construct and operate its station given that the station's service area includes the massive Los Angeles market. Given this service area, the denial of United's application on the basis of a highly questionable holding that it did not establish that participating banks would join in the financing of its loan is a clear injustice which requires correcting.

**II. This agency, by not disclosing the full basis for its decision, has deprived petitioner of its appeal rights.**

There is now an additional reason why this petition should be granted. In a case just recently decided, *Las Americas Communications, Inc.*, released March 16, 1987 (FCC 87R-8), the Review Board revealed, for the first time, that it had found United "financially disqualified in part because of apparent collusion in fashioning a defective bank loan commitment." In fact, nowhere in the Board's Decision in the instant case was United even accused of engaging in collusion with the bank. At 99

FCC 2d 183, the page of its Decision cited by the Board in support of this contention, the Board did find that United's bank letter "may have been more of an accommodation. . . ." A bank letter received as an "accommodation", however, is very different than one obtained as a result of collusion. Collusion is defined as "an agreement between two or more persons to defraud. . . ." *Black's Law Dictionary*, 4th Ed. Rev. An accommodation, on the other hand, does not involve fraud.

This recent statement by the Review Board, some two and one-half years after its Decision, raises questions as to why United was found disqualified. Although the Board qualifies its statement by saying that United's disqualification was "in part" because of collusion, there is no way of knowing how big a part this previously undisclosed factor may have had in the Board's Decision. To the extent that the Board based its Decision on the undisclosed belief that United was guilty of fraud in obtaining its bank letter, United has been deprived of its right to challenge the basis of that holding both with the Commission on Application for Review and with the Court of Appeals on Appeal. Thus, United has been denied its right to legal due process in this proceeding.

If United had known that the Board's Decision was based on a holding that it had engaged in collusion, on appeal it could have pointed out that it had no notice of the allegation and had never been given an opportunity to present evidence to rebut the charge. Under normal Commission procedure, when allegations are made against an applicant, an appropriate issue is added to the proceeding and the applicant is given the right to defend itself. Here, the Board apparently reached its Decision without following normal procedures and apparently found that United engaged in collusion without United even knowing it was accused of such conduct.

The Board's revelation is also significant in this case because the Court of Appeals held that the Board had

acted within its discretion in rejecting United's amendments filed after conclusion of the hearing. The Board's rejection was based on its holding that United had not demonstrated its financial qualifications at hearing. If the reason for the Board's action in holding United unqualified was not disclosed in its Decision, the Court of Appeals could not have formed an intelligent opinion as to whether the Board's action rejecting United's amendments was within the range of its discretion. Thus, the Board's revelation in *Las Americas* not only casts doubt on the Board's own Decision but also undermines the Court's affirmance thereof.

## CONCLUSION

This petition should be granted on two counts. The Board's Decision finding United financially unqualified was so contrary to precedent as to be arbitrary and capricious. Also, the Board's Decision did not reveal the full basis for its Decision, thereby depriving petitioner of its legal due process rights.

Respectfully submitted,

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86 1556 (2)

No.



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

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UNITED AMERICAN TELECASTERS, INC.,
*Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION,
*Respondent*

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**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1663

UNITED AMERICAN TELECASTERS, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION

And Consolidated Cases 85-1682, 85-1695

[Filed Dec. 29, 1986]

Before: WALD, Chief Judge; RUTH B. GINSBURG and BORK, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of the Kist Corporation, Bethel Broadcasting, Inc. and United American Telecasters, Inc., it is

ORDERED, by the Court, that the petitions for rehearing are denied.

*Per Curiam*

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 85-1663

UNITED AMERICAN TELECASTERS, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION

---

And Consolidated Cases 85-1682, 85-1695

---

[Filed Dec. 29, 1986]

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Before: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of the Kist Corporation, Bethel Broadcasting, Inc. and United American Telecasters, Inc. have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the aforesaid suggestions are denied.

*Per Curiam*

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1663

UNITED AMERICAN TELECASTERS, INC.,
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION,
*Appellee*

RIVERSIDE FAMILY TELEVISION
SUNLAND COMMUNICATIONS COMPANY,
*Intervenors*

No. 85-1682

KIST CORP.,
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION,
*Appellee*

RIVERSIDE FAMILY TELEVISION
SUNLAND COMMUNICATIONS COMPANY,
*Intervenors*

No. 85-1695

BETHEL BROADCASTING, INC.,
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION,
*Appellee*

RIVERSIDE FAMILY TELEVISION, INC.
SUNLAND COMMUNICATIONS COMPANY,
*Intervenors*

On Appeals from Orders of the
Federal Communications Commission

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[Filed Oct. 15, 1986]

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Before: WALD, Chief Judge, GINSBURG and BORK, Circuit Judges.

JUDGMENT

These cases were reviewed on the record from the Federal Communications Commission and were briefed and argued by counsel. The court has considered the issues presented and concludes that they occasion no need for a published opinion. *See* D.C. Cir. R. 13(c). For the reasons indicated by the Commission in its September 24, 1985 deposition, and in the accompanying memorandum, it is

ORDERED and ADJUDGED, by the Court, that the decision challenged in these appeals be affirmed. It is

FURTHER ORDERED, by the Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

*Per Curiam*

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

## MEMORANDUM

The administrative law judge and Review Board reasonably concluded that United American Telecasters, Inc. (United) had not established the requisite financial qualification through the proposal relying on West Olympia Bank. That bank was unable to supply more than a relatively small part of the needed funds, and was not shown to have had any experience in syndicating loans. Nor does the record indicate that any plans had been made for syndication of the projected loan to United. The agency decisionmakers appropriately required evidence that the proposed lender be both willing and able to furnish the necessary funds.

Furthermore, when West Olympia Bank passed out of existence, the Review Board acted within the bounds of its discretion in refusing United's tender of a substitute lender. Allowing United a second chance at that stage of the proceeding would have significantly retarded the orderly discharge of the Commission's task.

In light of the circumstances presented, it was permissible for the Commission to accept as bona fide the division of ownership rights and responsibilities between the general partners of Sunland Communications Company (Sunland). The majority (Hodin—55%) and minority (Soto—35%) stakes in the Sunland venture were assigned with a reality wholly lacking in the case of Riverdale (sic) Family Television, Inc. (Family), and both Hodin and Soto, in fact as well as in form, assumed liability for partnership obligations to third parties. While the ownership designations made by applicant Family were properly judged incredible, the Commission was not similarly impelled to characterize the Sunland arrangement a facade.*

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* Our inspection of the Commission's adjudication confirms the representation made at argument that the construction permit grant did not turn on the qualitative enhancement accorded Sun-

land based on Soto's racial minority status. The Commission reasonably appraised the 35% full-time and 55% part-time integration credits of Sunland as quantitatively superior to the 37.49% full-time integration credit of KIST.

**APPENDIX D**

FCC 85-512
36158

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Applications of

BC Docket No. 81-863
File No. BPCT-810717KK
Kist Corp.
Riverside, California

BC Docket No. 81-867
File No. BPCT-810720KL
Sunland Communications Company
Riverside, California

BC Docket No. 81-868
File No. BPCT-810720KM
Bethel Broadcasting, Inc.
Riverside, California

BC Docket No. 81-870
File No. BPCT-810720KO
Riverside Family Television, Inc.
Riverside, California

BC Docket No. 81-871
File No. BPCT-810720KQ
United American Telecasters, Inc.
Riverside, California

For a Television Construction Permit

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MEMORANDUM OPINION AND ORDER

Adopted: September 18, 1985 Released: September 24, 1985

By the Commission:

1. This proceeding involves mutually exclusive applications for a new UHF television station on channel

62, at Riverside, California. In an Initial Decision, FCC 83D-60, released November 4, 1983, 99 F.C.C. 2d 201, the ALJ found that United American Telecasters, Inc. (United) was not financially qualified to be a licensee and he granted the application filed by Sunland Communications Corporation (Sunland). In a Decision, FCC 84R-74, released October 19, 1984, 99 F.C.C. 2d 173, the Review Board affirmed United's disqualification. It reversed the ALJ, and granted the application of KIST, Corp. (KIST). Now before the Commission are Applications for Review of the Review Board's Decision, filed November 21, 1984, by Sunland, Bethel Broadcasting, Inc. (Bethel), Riverside Family Television, Inc. (Family), and United.[1] Also before the Commission are a Request for Oral Argument filed November 21, 1984, by Family,[2] and a Petition for Leave to Amend filed January 15, 1985, by United.[3]

2. We affirm the decision of the Review Board in all respects except its analysis of the integration of ownership and management criterion concerning Sunland and its ultimate grant of KIST's application. As discussed below, while we do not disagree with the general prin-

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[1] Oppositions to the Applications for Review were filed on December 21, 1984, by KIST, Sunland, Bethel, Riverside, and United. KIST filed four Oppositions, one relating to each Application for Review. On December 28, 1984, Sunland moved to strike KIST's multiple Oppositions for failure to comply with the page limitation of Section 1.115(f) of the Rules. On January 7, 1985, KIST filed an Opposition to the Motion to Strike. Section 1.115(f) does not prohibit the filing of multiple oppositions to multiple applications for review. The Motion to Strike will be denied.

[2] On November 28, 1984, KIST filed an Opposition to the Request for Oral Argument. The request will be denied. Family has not shown how oral argument would materially assist the resolution of this proceeding.

[3] On January 24, 1985, Family and Sunland filed Oppositions to the Petition for Leave to Amend. The Petition will be dismissed as moot.

ciples articulated by the Board, we conclude that it erred in applying those principles to this matter.

3. The ALJ awarded Sunland comparative credit for the full-time integration of Andres Luis Soto, a 35% partner of Hispanic heritage, who is the proposed general manager of the station, and for the part-time integration of Jack Hodin, a 55% partner. *See* 99 F.C.C.2d at 221-24, 249.[4] The Review Board, finding that Mr. Hodin was the real party-in-interest behind Mr. Soto's partnership interest, denied Sunland credit for the integration of Mr. Soto into management of the proposed station. 99 F.C.C.2d at 189-92.

4. The Board pointed out that Mr. Hodin assumed the entire responsibility for financing Sunland's application, that he had contributed Mr. Soto's share of the initial capital as a loan and that if the application is not granted, Mr. Soto incurs no obligation to repay Mr. Hodin for such loan. The Board also noted that although Mr. Soto was obligated to contribute proportionately to finance the construction and operation of the station, Mr. Hodin would finance that contribution as well. When the station begins earning a profit. Mr. Soto would then become responsible for repaying these loans out of his share of the profits. Accordingly, the Board concluded that Mr. Soto had "no legal obligation or responsibility for the [Sunland partnership] entity." 99 F.C.C.2d at 190.

5. The Board correctly recognized that "financial investment . . . is not necessarily the *sine qua non* of an ownership interest creditable for integration purposes."

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[4] A 10% interest was formerly owned by another partner who has withdrawn from Sunland. That interest is now owned by Mr. Hodin. Sunland, however, is entitled to no integration credit for that additional 10% interest because of the Commission's prohibition against post-designation upgrading. *Birmingham Family Television, Inc.*, 91 F.C.C.2d 348 (Rev. Bd. 1982).

99 F.C.C.2d at 190.[5] However, the Board nevertheless improperly elevated Mr. Soto's lack of immediate financial obligation to a decisive consideration. The pertinent consideration with respect to Mr. Soto's interest is whether there has been a good faith division of ownership and whether it appears from the record that Mr. Soto will have a legitimate interest and influence in the Sunland partnership to warrant our confidence that his participation in the station's operations will be consistent with the purposes behind the integration criterion. We find that the record here supports such a conclusion.[6]

6. For example, the Sunland partnership agreement, which the Board did not discuss, reposes real authority

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[5] We specifically reaffirm the policy set forth in *Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982), in which we approved the applicability of our tax certificate and distress sale policies to certain limited partnership type arrangements. We recognized there the "unique nature of limited partnerships," but cautioned "that in order to avoid 'sham' arrangements, we will continue to review such agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)." 92 F.C.C.2d at 855. Our conclusion here is consistent with that approach. We reject, as did the Board, the general proposition advanced by some parties here (*e.g.*, Tr. at 3480) that an essential element of meaningful minority participation is financial obligation.

[6] The Board incorrectly concluded that its rulings in *Henderson Broadcasting Co.*, 63 F.C.C.2d 419 (Rev. Br. 1977) and *Berryville Broadcasting Co.*, 70 F.C.C.2d 1 (Rev. Bd. 1978), dictated a finding that Sunland was not entitled to credit for Mr. Soto's ownership interest in the partnership. As discussed below, the Sunland partnership agreement demonstrates to us, as the ALJ concluded, that it is a *bona fide* ownership arrangement and that recognizing Mr. Soto's 35% ownership would be consistent with the underlying objective of the integration credit. The facts of Sunland's ownership arrangement are clearly distinguishable from *Henderson* and *Berryville* to a decisionally significant degree. To use the Review Board's words, Mr. Soto will "have a palpable stake in [the] ultimate license" sufficient to ensure that he "will be scrupulously faithful to the public trust embodied in a license." 99 F.C.C.2d at 186.

in Mr. Soto, establishing the *bona fides* of his 35% ownership interest. Not only will Mr. Soto be the full-time general manager of the station, but the partnership agreement provides him with negative control over major financial and other partnership decisions.[7] While Mr. Hodin's 55% interest is sufficient to provide him with *de jure* control over Sunland, the partnership establishes an intention to share his authority over the proposed station.[8] Accordingly, we conclude that Mr. Soto is the *bona fide* owner of a 35% interest in Sunland, and Sunland is entitled to integration credit for his full-time participation as the station's general manager.

7. By contrast, we find that the ALJ and the Board were correct in their conclusion that Ms. Kearney, the 95% stockholder in Riverside Family, is not the true and actual owner of the applicant and should be considered for integration purposes as having no ownership inter-

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[7] Under the agreement, salaries of the partners are set by the partners' "unanimous agreement." In addition, Mr. Soto's consent is required for the partnership to "borrow or lend money, or make, deliver or accept any commercial paper, or execute any mortgage, security agreement, bond or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the partnership other than the type of property bought and sold in the regular course of business." In addition, the agreement provides that Mr. Soto must sign all checks withdrawing partnership funds. The partnership agreement also may be amended or the partnership dissolved only by unanimous agreement of the partners. *See* Family Exh. 9 at 4-6.

[8] In light of the clearly *bona fide* nature of the Sunland partnership agreement, we are unpersuaded that there is any relevance to the manner in which Mr. Hodin and Mr. Soto came to enter into the agreement. *See* 99 F.C.C.2d at 191. There may be some circumstances where such facts are relevant to our determination of the *bona fides* of an ownership arrangement. However, where there is a written agreement entered into demonstrating that there will be a sharing of ownership authority and no evidence that the agreement has been ignored by the parties, generalized allegations concerning the parties' lack of a previous relationship are unpersuasive.

est. 99 F.C.C.2d at 181-89, 228-33, 250-52. The record does not demonstrate that Ms. Kearney has been significantly involved in the Family application, or is likely to be involved in the affairs of the station as an owner.

8. We simply find it incredible that Mr. Dalton would make a gift of a 95% interest in this corporation to a near stranger. As noted earlier, we reject the proposition that Ms. Kearney's failure to make a financial contribution to the corporation or incur financial obligations, by itself, precludes a finding that she has an ownership interest creditable for integration purposes. The fact that Ms. Kearney is a minority female and area resident who would devote full time to working as the general manager of the station would enhance the corporation's chances of obtaining the license and could rationally explain Mr. Dalton's awarding her some interest.[9] We cannot believe that her contributions of this nature, however, can explain Mr. Dalton's, in effect, "giving away the store." We simply do not find it credible that a 5% interest in this corporation is sufficient to justify, for example, Mr. Dalton's guaranteeing a bank loan for $500,000 to the corporation, pledging to loan an additional $500,000 himself if necessary, and providing at least $70,000 to prosecute the application.

9. The difference between Family's proposal and other seemingly similar cases,[10] including the proposal of Sunland in this proceeding is more than a question simply of degree. In each of those other circumstances there

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[9] It is, of course, not improper for an applicant to structure its proposal in a manner that is believed most likely to prevail in a comparative proceeding *if* the proposal is *bona fide*. To the extent that the Board's opinion may be read to suggest otherwise (*e.g.*, 99 F.C.C.2d at 184), it is mistaken.

[10] *See, e.g., Alexander S. Klein, Jr.*, 86 F.C.C.2d 423 (1981); *Las Misones de Bejar Television Co.*, 93 F.C.C.2d 191 (Rev. Br. 1983); *San Joaquin Television Improvement Corp.*, 96 F.C.C.2d 594 (Rev. Bd. 1983).

was a basis to conclude that the ownership proposals reflected a *bona fide* business arrangement. *See* 99 F.C.C. 2d at 184-86. Viewing the record as a whole here, we are unable to conclude that Riverside Family's proposal is a *bona fide* business arrangement.[11] We agree with the Review Board and the Administrative Law Judge, therefore, that the real control of this applicant resides in Mr. Dalton and that Ms. Kearney should receive no ownership credit for integration purposes.

10. KIST is entitled to credit for the full-time integration of 37.49% of its ownership, enhanced by 29.6% local residence and 8.33% Hispanic ownership.[12] Bethel is entitled to credit for the full-time integration of 33% of its ownership enhanced by local residence. Sunland is entitled to credit for the full-time integration of Mr. Soto's 35% ownership interest and the part-time integration of Mr. Hodins 55% ownership interest. Sunland's integration is enhanced by Mr. Soto's Hispanic

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[11] Among other factors, we specifically refer to the overwhelming percentage of stock given by Mr. Dalton to Ms. Kearney, the fact that Ms. Kearney has exercised virtually no control over preparation of the application, that she has had no involvement in obtaining financing commitments, has contributed no capital to the enterprise and incurred no financial obligations, that there is no written agreement defining such things as how authority in the corporation will be exercised or how the loans will be repaid by the corporation, and finally the fact that to this point Mr. Dalton has clearly dominated the affairs of this corporation despite his minimal 5% stock ownership and has largely ignored the corporate form and Ms. Kearney's 95% stock ownership. We note in this regard the Judge's finding that the "shareholders and directors of Family [*i.e.* Mr. Dalton and Ms. Kearney] have repeatedly ignored the company's corporate form and violated its governing documents." 99 F.C.C.2d at 233. We lack confidence on this record that such practices will not continue if this corporation receives a license to operate a television station in Riverside.

[12] While KIST also proposes 4.17% female ownership, this factor would not alter the outcome of this case. In any event, the practice of giving credit for female status was set aside in *Steele* v. *FCC*, No. 84-1176 (D.C. Cir. August 23, 1985).

heritage and local residence. The quantitative differential between KIST's and Sunland's full time integration proposals is off set by the qualitative enhancement of Mr. Soto's 35% interest, the part-time integration of Mr. Hodin's 55% interest,[13] and the fact that Sunland proposes to integrate a majority of its stock ownership. Sunland's application is quantitatively and qualitatively superior to the applications of KIST, Bethal and Family.[14]

11. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed November 21, 1984, by Sunland Communications Company, IS GRANTED.

12. IT IS FURTHER ORDERED, That the Applications for Review, filed November 21, 1984, by Bethel Broadcasting, Inc., Riverside Family Television, Inc., and United American Telecasters, Inc., ARE DENIED.

13. IT IS FURTHER ORDERED, That the Motion to Strike, filed December 28, 1984, by Sunland Communications Company, IS DENIED.

14. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed January 15, 1985, by United American Telecasters, Inc., IS DISMISSED as moot.

15. IT IS FURTHER ORDERED, That the Request for Oral Argument, filed November 21, 1984, by Riverside Family Television, Inc., IS DENIED.

16. IT IS FURTHER ORDERED, That the Decision of the Review Board, FCC 84R-74, released October 19, 1984, 57 RR 2d 49, IS MODIFIED to the extent indicated herein, and in all other respects IS AFFIRMED.

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[13] Mr. Hodin will spend a minimum of 20 hr. a week at the proposed station "on a day to day basis." Sunland Exh. 4. *Cf. Bay Television, Inc.*, FCC 85-58 n. 2, released March 25, 1985.

[14] Family is entitled to no credit for integration and is subject to a slight demerit for the interest of its principal in a permittee of a UHF television station in Springfield, Missouri.

17. IT IS FURTHER ORDERED, That the Application (File No. BPCT-810720KL), filed by Sunland Communications Company for a construction permit for a new UHF Television Station at Riverside, California, IS GRANTED; and that the applications of KIST Corp. (File No. BPCT-810717KK), Bethel Broadcasting, Inc. (File No. BPCT-810720KM), Riverside Family Television, Inc. (File No. BPCT-810720KO), and United American Telecasters, Inc. (File No. BPCT-810720KQ), ARE DENIED.

FEDERAL COMMUNICATIONS
COMMISSION

WILLIAM J. TRICARICO
Secretary

**APPENDIX E**

FCC 84R-74
0280

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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IN RE APPLICATIONS OF

BC Docket No. 81-863
File No. BPCT-810717KK
KIST CORP.
Riverside, California

BC Docket No. 81-866
File No. BPCT-810720KK
ETTLINGER BROADCASTING CORPORATION
Riverside, California

BC Docket No. 81-867
File No. BPCT-810720KL
SUNLAND COMMUNICATIONS COMPANY
Riverside, California

BC Docket No. 81-868
File No. BPCT-810720KM
BETHEL BROADCASTING, INC.
Riverside, California

BC Docket No. 81-869
File No. BPCT-810720KN
CHANNEL 62, A Limited Partnership
Riverside, California

BC Docket No. 81-870
File No. BPCT-810720KO
RIVERSIDE FAMILY TELEVISION, INC.
Riverside, California

BC Docket No. 81-871
File No. BPCT-810720KQ
UNITED AMERICAN TELECASTERS, INC.
Riverside, California

For a Television Construction Permit

APPEARANCES

*James E. Greeley* and *T. Michael Janowski* on behalf of KIST Corp.; *Daniel W. Toohey, John R. Feore, Jr.*, and *Todd D. Gray* on behalf of Sunland Communications Company; *A. Thomas Carroccio* on behalf of Bethel Broadcasting, Inc.; *Jonathan D. Blake* and *Jonathan L. Wiener* on behalf of Riverside Family Television, Inc.; and *Seymour M. Chase* and *Robert A. Zauner* on behalf of United American Telecasters, Inc.

DECISION

Adopted: October 15, 1984; Released: October 19, 1984

By the Review Board: MARINO (Chairman), JACOBS, and BLUMENTHAL.

Board Member BLUMENTHAL:

1. This proceeding involves the mutually-exclusive applications of KIST Corp. (KIST), Ettlinger Broadcasting Corporation (Ettlinger), Sunland Communications Company (Sunland), Bethel Broadcasting, Inc. (Bethel), Channel 62, a Limited Partnership (Channel 62), Riverside Family Television, Inc. (Family), and United American Telecasters, Inc. (United) for authorization to construct a new television station in Riverside, California to operate on Channel 62.[1] By *Hearing Designation*

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[1] Applications by Riverside Telecasters, Inc., Pan-Pacific Broadcasting, Inc. and Focus Broadcasting of Riverside, Inc. were dis-

*Order* (*HDO*), 46 Fed. Reg. 62936, published December 29, 1981, the applications were designated for consolidated hearing on various qualifying issues and on the standard comparative issue. Additional issues were subsequently specified by presiding Administrative Law Judge (ALJ) Joseph Chachkin. *Order*, FCC 82M-1645, released May 24, 1982. In an *Initial Decision* (*I.D.*), FCC 83D-60, released November 4, 1983, the ALJ initially disqualified Ettlinger, Channel 62, and United on qualifying issues and selected Sunland as the winning applicant based on its comparative superiority on the integration of ownership and management criterion over the remaining qualified applicants, KIST, Bethel, and Family.

2. The proceeding is now before the Review Board on exceptions filed by all of the losing applicants (except Ettlinger and Channel 62 [2]) and on limited exceptions filed by Sunland. United devotes most of its brief and exceptions to its disqualification under a financial issue while the other applicants concentrate their exceptions on the ALJ's findings under the integration criterion. Additionally, the parties have filed contingent petitions to enlarge issues against United and KIST. We have reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held on March 30, 1984, the underlying record, and the contingent petitions to enlarge issues as well as the material proffered herein by the parties. We adopt the findings of fact in the *I.D.* except as specifically modified herein, but reverse certain of the ALJ's dispositive conclusions and hold that a grant of KIST's

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missed by the presiding Administrative Law Judge pursuant to each applicant's request. *Order*, FCC 82M-1373, released April 28, 1982; and *Order* FCC 82M-2471, released August 13, 1982.

[2] Because Ettlinger and Channel 62 did not file exceptions to the Initial Decision, their respective applications will be dismissed with prejudice for failure to prosecute pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR § 1.276(f).

application would best serve the public interest. Before addressing the integration findings, on which the case ultimately turns, we will first turn to the only qualifying issue still contested, the financial issue against United.

3. *Financial Qualifications*: *United*. The Commission's *HDO* specified a financial issue against United based on various deficiencies in United's application financial showing. *See HDO*, paras. 18-19. Thereafter, in response, United amended its financial proposal on September 1, 1982, whereby it would rely on deferred equipment credit of $877,500 and a $2 million loan from the West Olympia Bank (then named Bank of Finance) to finance its estimated construction and three-month operation costs of $2,182,550. Its amendment was accepted by *Order*, FCC 82M-2786, released September 14, 1982. The deferred equipment credit aspect was not contested at hearing. Of interest, however, was a West Olympia Bank letter which expressly stated that the bank was willing to syndicate loans with its correspondent banks to extend to United a loan up to $2 million. United Exh. 1, Attachment A. Three witnesses testified at hearing on behalf of United concerning the purported loan: Mr. Jong Tae Kim, Executive Vice President of the West Olympia Bank, member of the bank's Senior Loan Committee, and signatory of the letter (Tr. 3235-3237); Mrs. Woo-Chang Lee England, a Vice President of the bank, loan officer, and because of Mr. Kim's difficulties with the English language, editor of the above bank letter (Tr. 2307-11); and Mr. Goon Suk Han, a director and member of the Senior Loan Committee of the West Olympia Bank (Tr. 2442-43). Mr. Han is also a director and a twenty-five percent shareholder in the United applicant (Tr. 2442).

4. In his decision, the ALJ concluded that the bank letter could not be credited as establishing United's basic financial qualifications. *See I.D.*, paras. 136-137. He observed that the proposed loan was well-beyond the legal lending limit of the West Olympia Bank ($150,000 to

$160,00 unsecured loans; $300,000 for secured loans, *see id.*, para. 19), and that in the absence of any showing that other banks would be willing to participate in the loan, there was no reasonable basis for concluding that the West Olympia Bank would be able to make the full loan in question to United. *Id.*, para. 136. He therefore concluded that United was not financially qualified. *Id.*, para. 137.

5. Exceptions have been filed on this issue by United and "limited" exceptions filed by Sunland and KIST. In its exceptions, United challenges its disqualification, arguing first that the standard utilized by the ALJ of requiring an applicant to show a willingness on the part of the correspondent banks to make the loans goes beyond the Commission's standard; and, second, that the testimony by the aforementioned witnesses removes all doubt that United had reasonable assurance of the availability of the bank loan. Sunland and KIST, on the other hand, argue that the ALJ erred in not providing two alternative bases for rejecting United's proffered bank loan; *i.e.*, the applicant's failure to satisfy the pertinent collateral requirements or to provide the bank with the requisite financial information.

6. In addition to the matters indicated above, new developments, which it is argued have an impact on the financial qualifications of United, have come to our attention. Specifically: (1) Family filed, on December 29, 1983, a contingent petition to enlarge and to reopen the record, contending that two United principals, Andrew and Rachel Kimm filed a Chapter 13 bankruptcy petition on July 13, 1983 with the United States Bankruptcy Court, Central District of California. Family therefore seeks the addition of reporting, candor, and legal qualifications issues against United. (2) On December 30, 1983, Sunland filed a contingent motion to reopen the record and to enlarge the issues, asserting that United's former counsel sued United and its individual sharehold-

ers in the U.S. District Court for the District of Columbia for collection of legal fees, obtaining a default judgment on February 1, 1983. Sunland further submits that Andrew and Rachel Kimm cross-claimed against United and the individual shareholders, alleging that the cross-defendants had fraudulently induced them into entering into the broadcast application venture upon the understanding that they would not be personally liable for the total indebtedness incurred, but that expenses would be shared *pro rata*. Sunland thus seeks against United an issue to explore the circumstances surrounding the fraud allegations and a reporting issue. (3) On March 6, 1984, KIST filed a petition to reopen the record questioning the continuing validity of the deferred equipment credit letter, which had expired by its terms in March 1983. KIST argues that it should not be presumed that the credit arrangement will be available should the application be granted in light of the serious financial difficulties currently being experienced by United and its principals. And (4) a series of petitions for leave to amend were filed by United on April 23, June 6, and August 15, 1984, respectively, informing the Board that the West Olympia Bank went out of existence (February 1984) and that its equipment credit letter expired (March 1983); that it has a new bank letter from the Los Angeles National Bank for a loan up to $2.5 million and a new equipment letter for equipment costing $1.8 million; and that its corporate charter is being amended to permit issuance of non-voting stock to various persons or companies, after which the equity in the company will be shared by the 50% voting stockholders and the 50% holders of preferred non-voting stock. The United petitions also included letters from correspondent banks indicating a willingness to participate in the syndicated loan and from the Los Angeles National Bank stating that its collateral requirements have been satisfied. Family, Sunland and KIST filed oppositions to the above petitions to amend contending that United has failed to demonstrate

"good cause" for acceptance of the amendments. *See* 47 CFR § 73.3522. Opponents assert that the amendments, if accepted, raise many new issues requiring further evidentiary hearing.

7. The proper starting point on this issue is the question of whether the ALJ was correct in concluding at hearing that United failed to demonstrate the requisite financial qualifications to be a Commission licensee. Although we are mindful that United's original proposal, *viz.*, the West Olympia Bank letter *et al.*, would be moot in any event in light of the bank's subsequent failure, it would be impossibly disruptive of our administrative processes (not to mention further delay of inauguration of a new broadcast service to the residents of Riverside) to afford United or any other comparative applicant, if correctly found financially unqualified after an extensive trial-type hearing, a post-hearing opportunity to establish its financial qualifications merely because of the fortuitous occurrence of the post-hearing failure of the bank relied upon by United. "Good cause" for accepting a late amendment must be shown. *See generally California Broadcasting Corp.*, 90 FCC 2d 800, 808 (1982) (fact that amendment was submitted to meet a disqualifying issue does not relieve the proponent of an amendment from meeting the Commissions "good cause" requirements).[3] A second and separate hearing under the

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[3] The Commission has adopted a six-point "good cause" test under 47 CFR § 73.3522(b).

> (1) the amendment was prepared with due diligence; (2) was not required by the voluntary act of the applicant; (3) will not necessitate modification or addition of issues or parties; (4) will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) will not unfairly prejudice other parties; and (6) will not cause the applicant to gain a comparative advantage.

*Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). While the Commission has relaxed its "good cause" test for amendments going to basic qualifications, *see Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981) (foreseeability not relevant and "due

instant circumstances would be enormously disruptive at this stage and would not be in the public interest. Obviously, if an applicant *had* established its financial qualifications at hearing and, subsequently, the bank upon which it relied for funds failed unexpectedly, the Commisison would take into consideration the equities of the case in determining whether the applicant would be permitted to amend its application. *See, e.g., Valley Broadcasters, Inc.*, 95 FCC 2d 448 (Rev. Bd. 1983); *Anax Broadcasting, supra* note 3. In this proceeding, however, we need not speculate over what action would have been appropriate in the above situation since we find that United failed to establish its financial qualifications at hearing. *See* paras. 8, 10, *infra*.

8. Thus, the ALJ properly refused to credit the West Olympia Bank letter and correctly held that it did not demonstrate United's financial qualifications to be a Commission licensee. As a general proposition, the Commission holds that a bank loan commitment letter provides reasonable assurance of the availability of a bank loan in the absence of a showing undermining the validity of the letter or the bank's ability to make the loan. *See Jay Sadow*, 39 FCC 2d 808 (Rev. Bd. 1973). But, where the proposed loan would *prima facie* violate statutory limitations governing the amount a particular bank may lend, the Commission may require a "futher showing" of availability. *See CBS, Inc.*, 49 FCC 2d 1214, 1228-29 (Rev. Bd. 1974). United submits that the "further showing" requirement is satisfied simply by submitting evidence that the lead bank issuing the commitment letter is aware that the proposed loan will require the participation of other banks. *See* United Exceptions at 5. We disagree. Although the precedent relative to syndi-

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diligence" depends on the surrounding equities), it has not abandoned *all* prerequisites for the acceptance of such post-hearing amendments. *See Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *aff'd*, FCC 84-119, released April 2, 1984 (Comm'n).

cation loans may be written somewhat unevenly, *see Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1362-1364 (Rev. Bd. 1983), we note that virtually all of the cases cited by United in support of its legal proposition contain significant elements which militate against the acceptance of the lax standard postulated by United.[4] More recent precedent holds that a "further showing" must be made that correspondent backs are willing to participate in the proposed loan. *See, e.g., CBS, Inc., supra,* 49 FCC 2d at 1229; *Advanced Mobile Phone Service, Inc.* (*Philadelphia*), 52 RR 2d 1593, 1597 (CC Bur. 1983).[5] In any event, where a specific issue has been designated by an ALJ and evidence from bank personnel *has* been taken, the question of whether there was, in fact, reasonable assurance of the availability of the applicant's funding must be evaluated on the basis of the evidence of record.

9. In that regard, United submits that the testimony presented by bank witnesses removed any doubt that it had reasonable assurance of the availability of the bank loan. United Exceptions at 7. It argues: (1) that Mr.

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[4] *See, e.g., TVue Associates, Inc.*, 5 FCC 2d 419 (Rev. Bd. 1966) (applicant submitted letters from five other banks confirming that they would share in the loan to the applicant); *Adirondack Television Corp.*, 5 FCC 2d 623 (Rev. Bd. 1966) (failure to show that Commission had not fully considered matter prior to designation); *Lamar Life Broadcasting Co.*, 26 FCC 2d 112 (Rev. Bd. 1970) (applicant submitted a bank letter committing five banks and investment company to lend it the necessary funds); *Advanced Mobile Phone Service, Inc. (Phoenix)*, 53 RR 2d 12 (CC Bur. 1983) (lead bank had capacity to provide entire credit package in the event other banks did not partiicpate); *Cherokee Broadcasting Co.*, 88 FCC 2d 138 (Rev. Bd. 1967) (bank's board of directors approved handling the proposed loan applicant).

[5] *Contra Lamar Life Broadcasting Co.*, 26 FCC 2d 932, 938 (Rev. Bd. 1970), where the Board indicated that letters of commitment from participatory banks are not necessary. However, the language there did not relate to a financial issue, but was instead directed to a request for a reporting issue.

Kim, a member of the Senior Loan Committee and signatory of the letter, testified that the (now-defunct) bank intended to syndicate the loan and did not then perceive any problem in arranging the syndication; (2) that Mrs. Woo-Chang Lee England, a loan officer, said she had known of three occasions where her bank had made participation loans, one of which was in the sum of $1,500,000; and (3) that Mr. Goon Suk Han, a director of the failed West Olympia Bank and a principal of United, noted that he was aware of at least one syndicated loan in which the bank had participated. *See id.*

10. Nonetheless, the ALJ was correct in finding that the general testimony of United's three witnesses provided no reasonable assurance of the availability of the total United loan. Initially, the failed bank's assets were relatively small, totalling a little over $22 million (Tr. 2314). Its unsecured loan limit was approximately $160,000 (Tr. 2315) and even its secured loan limit was only $300,000 (Tr. 2315).[6] The proposed loan here in question was for $2 million, or approximately *12 1/2 times* the bank's unsecured credit limit and nearly *7 times* its secured credit limit. Second, it remains unclear to what extent the bank had previously participated in syndication loans. Mr. Han, who for two years had been a member of the bank's Senior Loan Committee (Tr. 2443), and is a United principal, testified vaguely that he was aware of one occasion in which his bank had participated in a syndicated loan (Tr. 2466). But, Mr. Kim, who had also been with the bank for two years and was also a member of the Senior Loan Committee (Tr. 3236-37), testified that he was unaware of the bank's involvement

[6] Secured loans were normally those guaranteed by a savings account (up to 85%), a savings secured loan, a first trust lien, or a guarantee by government agencies. Tr. 2316, 3323. In light of the financial problems experienced by this applicant and the secured interest on the equipment by the manufacturer, it is wholly open to question as to whether United would have been able to meet the bank's criteria for a second loan.

in any syndicated loans during his tenure (Tr. 3277). Mrs. England, a loan officer (but not a member of the Senior Loan Committee (Tr. 2313, 2322)), testified that she had no personal knowledge of the bank's approval of any loans in excess of its legal lending limit (Tr. 2319), though she said that she had been told by the Senior Loan Administrator that there were at least three occasions where the bank had made participation loans of unstated magnitude, perhaps for more than $1 million (Tr. 2325). However, the Senior Loan Administrator, who might have shed more light on this matter (*see* Tr. 2326), did not testify. Third, no arrangements whatever had been made with any other bank for participation in the proposed West Olympia loan (Tr. 3277), nor had that bank examined the financial statements of the principals or the applicant, save for an estimated income statement of the applicant (Tr. 3278). Fourth, the late West Olympia Bank was completely unaware that United's proposed $1,800,000 in broadcast equipment would be subject to a prior security interest by the equipment manufacturer (Tr. 3295), and its Loan Committee had not even considered the proposed United loan (Tr. 3352). Finally, we differ with United's positive characterization of Mr. Kim's testimony; Kim merely indicated that he did not think the West Olympia Bank would "have a problem to syndicate the loans if we had a good product" (Tr. 3328). But, whether the "product" was "good" was apparently never discussed. In the face of the designated financial issue, the evidentiary burden of establishing reasonable assurance of the availability of the bank loan was on United, and, like the ALJ, we find that United failed this burden.[7] Rather, based on

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[7] United implicitly argues that it should have a lesser standard of proof to meet, and concludes that the Commission has been moving steadily in the direction of removing financial impediments for minority persons to own and operate broadcast stations. *See* United Exceptions at 8. Although the Commission has, indeed, indicated its concern relative to minority financing, *e.g., Minority*

the record evidence, it would seem that the West Olympia letter may have been more of an accommodation to Mr. Han, a director of the former bank, than a firm commitment that the Commission could credit as reasonable assurance of a $2 million loan. United's position here differs critically from the applicant who had relied on a similar bank letter in *Washington's Christian TV Outreach, Inc., supra.* There we felt that the applicant did not have sufficient opportunity at hearing to prove the availability of its financing, and we remanded the case for evidentiary hearing so that it might offer persuasive evidence. *See* 94 FCC 2d at 1364. In the instant case, United has had its full hearing opportunity, and it has not provided persuasive evidence in its favor. If anything, the evidence it did present casts serious doubt that the West Olympia Bank had the resources to make the loan or was reliably committed to that loan (on its own or with likely correspondent banks). In sum, we affirm the ALJ's conclusion that United is not financially qualified. In light of that disposition, we need not grant the petitions for enlargement of issues. Having failed once to demonstrate the financial qualifications, we will not reopen this hearing to decide whether United would be disqualified yet again, nor to make the rubble bounce.[8]

11. *Integration of Ownership and Management.* The *I.D.* concluded that the qualified applicants were entitled to quantiative integration credit as follows: KIST, 37.49% fulltime; Sunland, 35% fulltime and 55% parttime; Bethel, 33.3% fulltime; and Family 0%. The *I.D.*

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*Ownership of Broadcaster Facilities*, 69 FCC 2d 1591 (1978), it has not as of this date adopted lower financial qualification standards for minority applicants. *See, e.g., Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 30 n.5 (Rev. Bd. 1982).

[8] The recent bankruptcies and lawsuits involving United's principal would demand that a new hearing be held on United's financial qualifications, and we will not disrupt this proceeding to afford United yet another full hearing on its potential finances. It has already had its "day in court" and a fair hearing.

summarized that Sunland's integration proposal was superior to the other applicants because "only Sunland proposes to integrate a majority of its stock ownership (90%)." *I.D.*, at para. 165. We will review the exceptions to the underlying findings and conclusions.

12. *Integration Proposal of Family* Family excepts to the ALJ's rejection of its ownership integration proposal, specifically his refusal to credit Ms. Cheryal Kearney as an 80% integrated owner of the applicant. His view is that the purported 5% principal, Jack Dalton, is the true party-in-interest and the *de facto* head of Family while the contrasting claim that Ms. Kearney is an 80% controlling owner is merely a "facade to maximize Family's chances of winning the comparative hearing." *I.D.*, at para. 159.[9] The ALJ's findings and conclusions on this matter are set forth, respectively, at *id.*, paras. 101-112 and paras. 157-163. Summarizing the facts below, we analyze the exceptions under extant legal principals.

13. The ALJ found that the sole progenitor and promoter of the Family application was Jack Dalton, a resident of Nashville, Tennessee,[10] who previously had a 33% interest in the assignee of a construction permit for a television station in Springfield, Missouri (KSPR-

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[9] Our inconsistency as to the respective ownership interests of Kearney and Dalton arises because of Family's post-"B" cutoff increase of Kearney's putative ownership interest from 80% to 95% (and a corresponding reduction of Dalton's from 20% to 5%). *Compare I.D.*, para. 98, *with id.*, para. 157. The ALJ noted that even if Kearney was entitled to ownership integration credit, it could not exceed the 80% proposed before the legal deadline for comparative "upgrading." *Id.*, at n.42. While Family's exceptions skim over this matter and are occasionally inconsistent on the point, *compare* Family Exceptions at 27 ("Ms. Kearney has a 95% interest"), *with id.*, at 41 ("Family should have been awarded full 80% integration credit for Ms. Kearney"), we affirm the ALJ's ruling. Post-cutoff comparative "upgrading" will not be permitted. *Birmingham Family Television, Inc.*, 91 FCC 2d 348 (Rev. Bd. 1982).

[10] *I.D.*, n.25.

TV), an interest he sold during the course of this proceeding. *I.D.*, para. 99. After becoming aware of the instant Riverside opening, he singularly arranged for a $500,000 loan with his bank, Commerce Union Bank of Nashville,[11] personally guaranteed that loan, and even personally guaranteed that same amount to Family should the $500,000 bank loan prove inadequate.[12] Up to the close of hearing, Dalton "has provided all the funds for Family" in its quest for the station (*i.e.*, $65-70 thousand at that time).[13] Moreover, Dalton personally and unilaterally contracted with Sterling Communications, a consulting firm he had used in connection with his previous applications in Daytona Beach, Florida and Richardson, Texas, to "put the [Family] application together." [14]

14. Enter Ms. Kearney, a black resident of Los Angeles who, for the past 13 years, has been a "freelance set decorator," having earned her degree in interior design at Woodbury College and studied further in Paris where she met Mrs. Jack Dalton who was also studying there at that time.[15] Apart from one alleged social visit to the Dalton's Nashville home in 1980, she had never met Jack Dalton or discussed the broadcasting business with him until he telephoned her and sought her identity in the Riverside application.[16] Jack Dalton never met Kearney again until this hearing,[17] and Ms. Kearney

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[11] *Id.*, para. 110.

[12] *Id.*

[13] *Id.*, para. 109. Further, "Ms. Kearney had nothing to do with securing the Amvest equipment lease. . . ." *Id.*, at para. 108.

[14] *Id.*, at para. 107. For example, "the programming and EEO sections were prepared entirely by Sterling." KIST Reply at 9.

[15] *Id.*, paras. 102, 104.

[16] *Id.*, paras. 104, 107.

[17] *Id.*, para. 104.

has invested no money in the applicant. Dalton claims to have advanced the $1,000 for her purchase of her (95%) stock share in Family, expects no repayment,[18] and "Ms. Kearney testified that they never discussed reimbursement of Mr. Dalton's advances." *I.D.*, at para. 109. In fact, "[t]here was an explicit agreement that Ms. Kearney would not be required to pay for her stock, make loans or make other advances to Family." *Id.* (transcript citation omitted). Moreover, while Dalton set up Family's corporate account in Nashville at Commerce Union Bank and was a signatory to the account,[19] Kearney (a purported 95% owner) was not even made a signatory until much later. And, while many checks have been written during the prosecution of the application, Kearney had never written a check on the Family account.[20] Dalton has written the checks for the applicant's bills and retains the checkbook in Nashville, far away from Kearney.[21] Finally, although seeking credit for fulltime (day-to-day) integration credit as the 95% owner of a new television station, Kearney would not, at hearing, commit herself to moving from Los Angeles or, indeed, moving closer to Riverside (a city some 65 miles east) *even if Family should here prevail.*[22] In light of

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[18] *Id.*, para. 106.

[19] As was a Dalton associate in Nashville, Doctor Crants, who was involved in Dalton's Daytona Beach and Richardson applications (*I.D.*, para. 111), but who is not even a principal of Family.

[20] *Id.*, para. 111.

[21] *Id.* Doctor Crants (*supra* note 19) also signed Family's checks.

[22] *Id.*, para. 102. Notwithstanding Kearney's declination to indicate a move to Riverside or her complete lack of broadcast management experience, it is asserted that "she will supervise the construction and operation of the station" and "will be responsible for making decisions regarding employment, programming and the station's operating budget." *Id.*, at para. 101. Even had we not rejected Kearney's integration credit on the grounds set forth herein, her refusal to commit to a change of residence to (or close to) Riverside would probably deprive her of the right to be considered a local owner for integration purposes.

the foregoing (as well as other revelatory indicia discussed in the *I.D.*), the ALJ invoked the principles reaffirmed in *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978), looked beyond Family's paper corporate construct, and found—to no real surprise—that Dalton *de facto* controlled the corporation.[23] Using the language of *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419, 426 (Rev. Bd. 1977), he opined that recognizing Ms. Kearney as a *bona fide* 95% integrated owner of Family would "make a mockery of the underlying objective of the integration credit." [24]

15. Relying chiefly on the Commission's decision in *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981),[25] Family argues that "an applicant should receive integration credit for a principal who was given stock in the applicant precisely to enhance the applicant's integration showing by gaining a minority preference." [26] Thus, while unabashedly conceding at hearing that the "sole reason" Ms. Kearney was listed as a 95% owner of Family (and Dalton willing to retain a nominal 5%) was to dispositively outdistance his competitors on ownership integration credit [27] Family submits that "there are strong policy

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[23] *Id.*, para. 163.

[24] *Id.*

[25] Family also relies heavily on two subsequent Board decisions: *Las Misiones de Bejar Television Co.*, 53 RR 2d 119 (Rev. Bd. 1983); *San Joaquin Television Improvement Corp.*, 54 RR 2d 1206 (Rev. Bd. 1983). *See* Family Exceptions at 13-14.

[26] *Id.*, at 13. Preferential comparative treatment is given to broadcast applicants who propose to integrate (racial) minority (and/or female) principals into the management of a station. *See, e.g., West Michigan Broadcasting Co. v. FCC*, No. 82-2513 (D.C. Cir. May 25, 1984).

[27] *I.D.*, para. 105 (and supporting transcript citations). Integration of ownership with management yields a substantial preference under the seminal *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). *Cf. West Michigan Broadcasting*, note 26 above.

reasons for allowing applicants to achieve integration credit by giving equity to minorities interested in entering broadcasting." [28] Additionally, Family protests the ALJ's rejection of the ownership integration credit sought for Ms. Kearney while accepting the integration proposals of two of its competitors, Sunland and United; it asserts [29]:

> Finally, the ALJ's disparagement of the relationship between Ms. Kearney and Mr. Dalton is in remarkable contrast to his failure even to note that the financing principals of Sunland and United had never met proposed integrated principals in their application, Messrs. Soto and Digati, until their respective applications were filed or even later. Messrs. Soto and Digati also had not contributed to the finances of their respective applicants . . ., and were expressly recruited to enhance the comparative position of their respective applicants.

16. Family's vital reliance on *Alexander S. Klein, Jr., supra*, as a basis for crediting Ms. Kearney as a 95% integrated owner is rejected. As the ALJ reasoned, while the *Klein* Commission credited the integration pledge of a principal whose minor 5% stock interest in the appli-

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[28] Family Exceptions at 13.

[29] *Id.*, at 15-16 (citations omitted). *See also id.*, at 30-41. Family is not alone in questioning the ALJ's acceptance of Sunland's integration, for:

> In their proposed findings, all parties except Ettlinger and Sunland analyzed the Sunland partnership structure, concluding that it should be treated as a sham, thus entitling Sunland to 0% full-time integration credit under the doctrines of *Berryville Broadcasting Co.*, . . . . However, the ALJ refused to engage in an extensive analysis and concluded that Sunland was entitled to the integration credit which it claimed.

KIST Exceptions at 3 (citations and footnotes omitted). Sunland's integration proposal and the alleged disparate treatment are discussed *infra*, paras. 22-26.

cant was a gift from her long-time employer[30], *I.D.* at para 159.[31] First, there is no former employment relationship between Kearney and Dalton which, in any atmospheric sense as in *Klein*; could be equated with "consideration" for the stock; there was no relationship between Jack Dalton and Ms. Kearney before the filing of the application, and precious little thereafter. *See I.D.*, paras. 104-112. Nonetheless, Family buttresses its theory that the gift of 95% of its stock to Kearney is creditable for ownership integration purposes by citing two recent Board decisions, *Las Misiones de Bejar Television Co.* and *San Joaquin Television Improvement Corp.*, *supra* note 25. However, both of those cases are sharply different. In *Las Misiones*, the Board was faced with an integration proposal involving 11% minority owners who had taken bank loans to purchase their stock, but whose non-minority principal had guaranteed those loans. 53 RR 2d at 123. Quoting the ALJ, we there reflected that "[t]hose minorities recognized their limited stock interest," *id.*, and that all of the minority stockholders were *personally* liable for their stock. *Id.*[32] *San*

[30] *See* 86 FCC 2d at 432. All the Commission there held was: "Giving media entrepreneurship to a trusted former employee is a logical means of promoting minority involvement in broadcasting." *But see* Dissenting Statement of Comm'r Anne P. Jones, FCC 81-500, released December 2, 1981 (reconsideration of *Klein*).

[31] It may be perceived by some (as was jibed at oral argument) that the difference between *Klein* and Family is analogous to the difference between petty larceny and grand larceny, but the difference in a comparative sense is truly substantive. *Compare West Michigan Broadcasting, supra* note 26 (100% minority-female integrated ownership entitled to significant enhancing weight), *with Horne Industries, infra* note 32 (15% minority ownership "comparatively insignificant").

[32] There were other telling differences in *Las Misiones* as well: for example, minority stockholders there were involved in the negotiations for the applicant's loans and certain ones either sought their *own* financing for the loans or were prepared to pledge their personal net worth for the applicant's loans. *See* 53 RR 2d at 123. Family points to dictum in *Las Misiones* which may have suggested

*Joaquin* is completely inapposite. There the question was whether a "limited" partnership agreement allocating 45% of the equity of the applicant to the "limited" partners (who provided capital but no other future services and who sought no integration credit) and 55% to the "general" partners (who provided no capital but would fully manage the station) was cognizable for ownership integration purposes. The Board there found that the "limited" partnership agreement conformed in all respects to the Uniform Limited Partnership Act and represented a *bona fide* business arrangement. *See* 54 RR 2d at 1210-1211. Under the holding of *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 487-488 (1981), the integration of the "general" partners was credited.[33] But, in *San Joaquin*, there was no strained attempt by the "limited" partnership principals to structure the ownership so as to garner enhanced integration credit for minority and/or female ownership.[34] Indeed, the only female principal of the winning applicant (Darlene Spano) was a joint owner of the 45% "limited" partner; she neither asked for nor

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that even if the stock to the 11% minority principals had been a gift, "[o]ur action on this matter is squarely controlled by . . . *Klein.*" *See, e.g.,* Family Exceptions at 13 (*citing* 53 RR 2d at 124). While the *Las Misiones* Board might, under similar factual circumstances, have extended *Klein's* beneficience from 5% to 11%, that is a far cry from Family's situation. For while we generally consider 11% minority ownership to be "comparatively insignificant," *Horne Industries, Inc.*, 94 FCC 2d 815, 828 (Rev. Bd. 1983) (15% minority interest deemed "comparatively insignificant"), *modified*, FCC 84-286, released July 20, 1984 (Comm'n), a 95% ownership credit for an integrated minority female would be dispositive in most cases. *See West Michigan Broadcasting Co.* v. *FCC*, *supra* note 26.

[33] *See also Minority Ownership in Broadcasting*, 92 FCC 2d 849, 853-855 (1982).

[34] In fact, neither "general" partner (hence 100% of that applicant's integration base) received minority or female enhancement. *See* FCC 83D-35, released June 27, 1983 (ALJ), (*I.D.*, para. 53).

received integration credit or "female enhancement." *See* 54 RR 2d at 1210.

17. Importantly, though, neither *Klein* nor any subsequent case has overturned *Henderson* and *Berryville, supra*, or the critical precepts set forth therein to ensure that a purported principal is a true party-in-interest or, *de facto*, has that quantum of controlling leverage depicted in the paper organizational structure. These matters are important not only from a comparative licensing standpoint, but unless proposed applicant principals have a palpable stake in ultimate license, there is considerably less assurance that an alleged "integrated owner" will be scrupulously faithful to the public trust embodied in a license. Or, to put it aphoristically, "ease come-easy go." Thus, in *Henderson*, the Board rejected the ambitious scheme of a designing entrepreneur to secure 100% ownership integration credit by purporting to donate all of the corporate "voting stock" and "all but one share of its non-voting stock" to the applicant's "vice-president, director, and general manager," a man whose tangible contribution to the corporation had been about $300. 63 FCC 2d at 421. Ignoring the paper veil, the Board found that the applicant's entrepreneur who held "control of its 'purse strings'" (*id.*, at 425), who had dominated the applicant by being virtually its "sole financier," and who would "contribute all of the monies required for the cost of construction and operation of the station" (*id.*, at 421) was "the real owner and sole proprietor" (*id.*, at 425) despite the *de jure* emblements. Similarly, the *Berryville* Board refused to credit the integration proposals of two "nominal partners" claiming ownership interests of 20% each and found that the (legal) 60% owner, who had advanced all the funds for the partnership, was the true and actual owner. Like Ms. Kearney of Family, the "nominal" *Berryville* "partners" had contributed no capital to the venture, whereas—by contrast and like Family's Dalton—the 60% *Berryville* principal had not only contributed all the advance funds, he had

singularly arranged the bank loan (70 FCC 2d at 10), controlled the company checkbook (*id.*, at 9), and had prior involvement in broadcast stations (*id.*).[35]

18. From the foregoing paragraph, it might be inferred that the Commission's inevitable route to a determination as to *de facto* ownership was cartographed by "Watergate's" celebrated "Deep Throat," who persistently enjoined: "Follow the money." While an immediate financial investment is not the exclusive watermark of actual applicant ownership, *see, e.g., San Joaquin, supra,* it has long been recognized that financial dominance is a strong determinant of *de facto* control. Thus, the court has long appreciated that even a mere creditor whose position enables him to control aspects of an applicant's financial affairs must be recognized as negatively affecting an applicant's integration proposal. *WLOX Broadcasting Co.* v. *FCC*, 260 F.2d 712 (D.C. Cir. 1958). And, financial leverage remains a trustworthy clue in the Commission's search for *de facto* control, irrespective of legal title. *See, e.g., Stereo Broadcasters, Inc.*, 55 FCC 2d 819, (1975) ("the search for control necessarily calls

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[35] To be sure there were other indications in *Berryville* that the 20% minority principals were not *bona fide* partners. And, while the Board—citing *Klein* (*see* 70 FCC 2d at 8 n.13)—there recognized that individuals from minority groups could, under appropriate circumstances, be considered the beneficiaries of an outright gift of a portion of equity, it found no gift in that case. Similarly, while Family's exceptions and brief casually invoke *Klein* and covet its "gift" precedent, Dalton testified that he merely "lent" the money so far spent to Kearney. *I.D.*, para. 109. He said that the "loan" would accrue interest at 1% above prime after station operations begin. *Id.* Moreover, Family's brief is at pains to argue that Kearney *is* financially committed. Family Exceptions at 21-24. It states, for example, that her out-of-pocket expenses during the prosecution of the application (including "loss of other salary") "are well in excess of the $950.00 that Mr. Dalton paid Family for her stock." *Id.*, at 22. To the extent that Family asserts that Kearney has furnished reasonable consideration for the ($1,000) price of her stock, the "gift" precedent appears inapplicable.

for an investigation beyond stock ownership in order to determine effectively where actual control resides"). *See also George E. Cameron, Jr. Communications*, 91 FCC 2d 870, 887-893 (Rev. Bd. 1982), *recon. denied*, 93 FCC 2d 789 (1983).[36]

19. On the instant record, there can be no serious question that Jack Dalton has solely controlled, and will for the foreseeable future control, the actual destiny of Family, regardless of the names on the company stock shares.[37] While Family continues to pound away on Ms. Kearney's 95% "voting" control, it is clear here—as it was in *George E. Cameron, Jr. Communications, supra*—that Dalton, the *de jure* minority principal, totally controls the flow of the Family vessel, can shift course at will, or can stop it dead in the water at any time. No further prosecution of the application could take place without his impetus; not a spade of earth could be turned nor a tower girder riveted without Dalton's pure acquiescence. And even were Family to be licensed, not a studio bulb could light, a program be purchased, or a signal be emitted without Dalton's complete cooperation, irrespective of how Ms. Kearney "voted" her stock; many TV seasons wold pass before her empty "vote" could (but not necessarily *would*) translate into anything approaching practical control.

20. We are not insensitive to the movement to assist minorities who wish to enter broadcasting, and we have

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[36] *Cf. Metromedia, Inc.*, 55 RR 2d 1278 (1984), *recon. denied*, FCC 84-364, released August 10, 1984, where the Commission, citing *Stereo Broadcasters, supra*, found that an individual with far less than voting control of a public corporation had long had *de facto* control.

[37] Dalton has openly confessed that he has not paid too much attention to "corporate formalities." *I.D.*, at para. 112. Family "directors," Dalton and Kearney, have never had a corporate meeting, and Dalton continuously ignored corporate bylaws by taking unilateral action *legally* delegated to the Family board of directors. *See id.*

granted many, many licenses to qualified minority (or part-minority) applicants. We have, from time-to-time, even bent the precedent backwards to assist. *See, e.g., Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360 (Rev. Bd. 1983). But, even as the Commission has altered its views on ownership structures and organizational control mechanisms to aid minority entry into broadcasting, *see Minority Ownership In Broadcasting*, 92 FCC 2d 849 (1982) (recognizing, *e.g.*, "limited" partnership device for promoting venture capital), the Commission, recognizing the serious potential for abuse, pointedly warned "that in order to avoid 'sham' arrangements," it would monitor such arrangements on a case-by-case basis to ensure that *actual* control reposes in minority principals. *Id.*, at 855. While Family likens Dalton to a "limited" partner who provides only the capital financing (and, presumably, likens Kearney to a "general" partner),[38] there are critical factual and legal differences: "general partners are personally liable for the partnership debts," *Minority Ownership, supra*, 92 FCC 2d at 854; Family's Kearney is liable for none. *I.D.*, paras. 109-110. "Limited" partners "do not exercise any managerial control and do not incur any personal debts beyond their limited capital contribution." 92 FCC 2d at 854. Family's Dalton controls, and will control, Family absolutely for the foreseeable future; and he (a nominal 5% owner) has personally guaranteed the corporation's entire $500,000 bank loan (and personally promised an equal amount if necessary). *I.D.*, para. 110.[39]

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[38] *See, e.g.*, Family Exceptions at 14-15. Family insists that it should not be penalized for choosing corporate rather than partnership form. But it is not a matter of "form"; under law, partners (particularly "general" partners) have obligations and liabilities that corporate stockholders do not. *See Minority Ownership, supra*, 92 FCC 2d at 854.

[39] While Ms. Kearney's personal guarantee and financial statement was also offered to Dalton's Nashville bank, the bank was

21. In sum, Sunland states the matter at issue most succintly[40]:

> Family presents a classic case for the application of *Henderson* and *Berryville.* Dalton utilized Family's ostensible stock structure as a contrivance to further his own ambitions to acquire a television station at Riverside by gaining credit under the integration criterion. He then exercised control over the applicant in a manner wholly inconsistent with the structure. It is hardly possible to imagine a more transparent artifice. Failing to apply *Henderson* and *Berryville* here means the end of their vitality in policing the *bona fides* of proposals to the Commission.

We concur, and the ALJ's well-documented and well-considered rejection of Family's claim for 95% (or 80%) ownership integration credit is affirmed.

22. *Integration Proposal of Sunland.* As noted above, Sunland forcefully pleads against a concession on the ALJ's rejection of Family's ownership integration scheme[41]; but other parties hereto demand with equal vigor that Sunland's own integration proposal is, *ad eundem,* flawed.[42] Armored in the spiney carapace of righteous indignation over alleged discriminatory treatment by the ALJ, Family leads the pack of Sunland's predators and charges that "special provisions" in the Sunland partnership agreement wholly undercut the putative ownership interest of one of Sunland's two purported partners, Andres Luis Soto, a local (Riverside)

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uninterested, *I.D.,* para. 110, and Dalton did not even submit her material to the bank. KIST Reply at 8.

[40] Sunland Reply at 16.

[41] Sunland Reply at 13-16.

[42] *See, e.g.,* KIST Exceptions at 8-19; Bethel Exceptions at 7-16; United Exceptions at 22-26; Family Exceptions at 15-16, 30 *et seq.*

hispanic citizen with a reported 35% partnership interest in Sunland.[43] The other applicants opposing Sunland's integration credit for Soto, citing *Henderson* and *Berryville*, contend that Soto's commitment to, and responsibility for, Sunland's application and its potential future operations are nonexistent, thus depriving Sunland of Soto's credit for ownership integration. They claim that the real party-in-interest is Jack M. Hodin, a 55% Sunland principal and a present (long-time) resident of Scranton, Pennsylvania, who also holds a 30% interest in a Scranton supermarket chain as well as having other substantial investments in that region.

23. In crediting Sunland with Soto's integration proposal, the ALJ considered the objections of the parties, but found[44]:

> . . . Mr. Soto is fully obligated to contribute proportionately to finance the construction and operation of the station. Thus, it is clear that Mr. Soto has a financial stake in the Sunland partnership.

However, it is stipulated by Sunland that (1) "prior to the grant of Sunland's application Hodin would contribute Soto's share of capital on a loan basis" and (2) "if Sunland's application, was not granted, Soto would have no obligation for these contributions."[45]

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[43] Family Exceptions at 16, 36-37. It also asserts infirmities in the integration proposals of "EBC, United, Bethel, and Channel 62." *See id.*, at 31 (*et seq.*).

[44] *I.D.*, at para. 154. Soto is the proposed fulltime general manager of the potential Sunland broadcasting facililtly. *I.D.*, para. 80.

[45] Sunland Reply at 5. And, like Family's Cheryal Kearney, Soto has contributed no "financial resources to Sunland to aid in the application and hearing process." *I.D.*, at para. 154, Soto, who was not Hodin's first choice as a hispanic partner because he could not contribute anything to the venture, testified:

> I indicated to him [Hodin], well I'm not a rich man and so I can't really contribute financially.

KIST Exceptions at 11 (*quoting* Tr. 1261).

24. We have observed (*supra* para. 18) that an immediate financial investment, though generally signalling a positive ownership commitment, is not necessarily the *sine qua non* of an ownership interest creditable for integration purposes. *See e.g., San Joaquin Television Improvement Corp., supra.* It is merely one indicator, and had the parties here alleged nothing more than lack of "front money" from Soto, Sunland might well deserve creditation of Soto's purported 35% partnership interest. However, not only need Soto contribute no initial capital for prosecuting the application or constructing or operating any new station, and not only is he indemnified from all past and present Sunland expenses should it not receive this permit, the Sunland partnership agreement was specifically modified to provide[46]:

> Net losses shall be borne in proportion to contributions actually made by the partners in the partnership. Until Hodin is reimbursed for the contributions advanced by him on behalf of Strimel and Soto, all contributions shall be deemed to have been made by Hodin.

Thus, even if Sunland received the instant construction permit and commenced operations, Soto would still not have incurred one dime's worth of legal obligation or responsibility for the entity. Or, as one of the other parties framed it, having incurred no risk up to now, nor incurring any liability for future expenses or losses, Soto could simply "walk away from the partnership" with no less than he entered it. This is no genuine "partnership"—in the legal or any other sense.[47] *See Berry-*

[46] Bethel Exceptions at 11 (*quoting* Family Exhibit 9 at p. 4). Soto's testimony affirmed his understanding that he is not legally obligated to pay his proportionate share of any partnership losses. KIST Exceptions at 16 (*citing* Tr. 1271).

[47] As observed in the Commission's most recent *Minority Ownership* policy statement, *supra*, one of the primary characteristics of a true general partnership is that each such partner is "personally

*ville, supra.* We might hypothetically, view Hodin's munificence as a "gift," except that—while arguing that *Alexander S. Klein, Jr., supra,* controls its integration credit—Sunland inconstantly argues just as strenuously that[48]:

> . . . it must be remembered that Mr. Soto is required to pay back any advances to him from future station profits. Further, Mr. Soto is fully obligated to contribute proportionately to finance the construction and operation of the station. Thus, it is clear that Mr. Soto has a financial stake in the Sunland partnership. . . .

But future "profits" are subject to many vicissitudes: *viz.,* payments to principals; withdrawal of partnership equity; leveraged business expansion. Or, mercy, *real* operating losses, and profits from this Riverside UHF facility are far from a sure thing. More to the point regarding the applicability, *vel non* of *Klein,* if Hodin considers Soto to be contractually obligated to reimburse for all prior and future Sunland expenses (out of hypothetical "profits"), then there is no "gift" as in *Klein. Sunland* cannot, as they say, have it both ways.

25. Further, as with Family's misreliance on *Klein,* Sunland's must fail for similar reasons. For apart from the fact that *Klein* uniquely involved a mere 5% gift of stock to a trustworthy former employee (*see supra* note 30), the sequence of events precipitating Soto's 35%

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liable for the partnership dates." 92 FCC 2d at 854. Here, Hodin has absolutely relieved Soto of liability for Sunland's losses.

[48] Sunland Reply at 5 (*quoting I.D.,* at paras. 51-52) (footnote omitted). Sunland further submits (*id.*):

> If a gift of a critical ownership interest could qualify for integration credit under *Klein,* certainly a nonrecourse advance of funds, to be repaid if the applicant prevails, would pass muster.

Unfortunately for Sunland, its partnership agreement does *not* call for repayment "if the applicant prevails."

"partnership" interest confirms the underlying differences. As related by the excepting parties, Hodin's original application listed one George B. Strimel as a 10% partner.[49] Advised of the Riverside opening by Washington counsel, Hodin went to Riverside to conduct the "ascertainment" study of community leaders. He met Soto and told him that he would like to add a hispanic investor who could contribute financially to the venture. Soto introduced Hodin to a friend in the banking business, but the friend had no interest in contributing (nor could Soto find another hispanic investor interested in contributing). Unable to so augment his application, Hodin—just *four days* before the "B" cutoff deadline—listed Soto himself as a 35% partner.[50] This bears no relationship to the facts in *Klein* and is little different than the exploits of Family's Jack Dalton explained *supra*.

26. We are constrained to find Soto to be a Sunland "partner" in name only, *Berryville*, *supra*, and reverse the *I.D.* in its grant of ownership integration credit for Soto's putative interest. Whereas the ALJ was certainly correct in denying such ownership integration credit for Ms. Kearney of Family, Family is also quite correct in asserting that, *pari passu*, Soto has no greater legal or practical obligation to Sunland than Kearney does to Family. Nor any greater entitlement to the unique "gift" precedent of *Klein*. Like Family's Cheryal Kearney, Andres Soto—an otherwise highly impressive individ-

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[49] *See I.D.* at para. 77 & n.17. Strimel dropped out after the "B" cutoff date, raising Hodin's current share to a 65% partnership interest. Because we do not allow comparative "upgrading" after the deadline (*see supra* note 9), Hodin is legally regarded here as a 55% owner. He was credited with only parttime integration (20 hrs. per week or less), since he has substantial investments he must attend to in Scranton. *See* KIST Exceptions at 10.

[50] For a more complete chronology, *see* KIST Exceptions at 10-11.

ual [51]—has no present tangible interest in, or true (proportionate) partnership position with respect to the Sunland applicant.[52] That he "might" in the future (profits and many other matters being congenial) does not make him a true Sunland partner at present. Uniformly applying the precedents, particularly *Berryville*, no fulltime credit will be given based on Soto's nominal partnership interest in Sunland.

27. *Other Integration Proposals.* The ALJ awarded KIST 37.49% fulltime integration credit,[53] but denied credit for their proposed parttime principals, holding that the ordinary sales positions the latter would occupy were nonmanagerial.[54] The only real challenge to KIST's fulltime credit comes from Family, which asserts that KIST's "non-integrated Chairman of the Board and largest single stockholder who is also Chairman of the Board of the bank upon which KIST is relying for a loan testified that he had 'the ultimate decision on the conduct of

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[51] *See I.D.*, paras. 80-82. But, while Soto is slated to be the Sunland station's general manager, *see id.*, at para. 80, he is said to have virtually no business or managerial background. KIST Exceptions at 16.

[52] Bethel (and others) further argue, in essence, that Soto will have no control over the affairs of Sunland, *e.g.*:

> Nothing in the Sunland partnership agreement prohibits Mr. Hodin, as majority partner, from exercising total, unfettered control over such critical items as the proposed station's programming and personnel policies.

Bethel Exceptions at 13. But—unlike the situation with the hyperambitious Family applicant where Ms. Kearney was depicted as the 95% principal (with all of the influence and control that "lion's share" ordinarily implies)—Soto was always portrayed as a minority partner. Sunland has never claimed that Soto would control the entity or that Hodin did not have both *de jure* and *de facto* control.

[53] *I.D.*, para 152.

[54] *Id.*

the Station Manager and all personnel.' "[55] Well, we should hope so, but we rather miss Family's point. KIST has not claimed fulltime integration credit for its Chairman (and 12.5% principal),[56] and we would assume that his position—with the support of the majority stockholders—would generally prevail.[57] And KIST's 37.49% credit inherently reflects that the owners who are to be integrated do not control the entity. For its part, KIST excepts to the ALJ's rejection of its parttime proposal and an hispanic "enhancement" for another principal (Carlos Fox) on the claim that Fox's grandfather was born in Cuba.[58] We have reviewed the record, and will afford KIST a very slight enhancement for Fox's (8.33%) interest; the ALJ's reasons for denying Fox's claimed hispanic status are not necessarily determina-

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[55] Family Exceptions at 32 (*quoting* Tr. 908). It later submits:

> Finally, KIST's non-integrated Chairman of the Board's similar position with the bank upon which KIST is relying for its loan should raise far more serious questions than Family's reliance upon a bank in which one of its principals has deposits.

*Id.*, at 35.

[56] *I.D.*, para. 65.

[57] KIST's largest stockholder and Chairman is Hugh B. MacCauley, *I.D.*, para 50; as noted, his request for integration credit as a would-be part-time salesman has been denied and no "residual credit" as mentioned in the *I.D.* (para. 165) is due to KIST.

[58] KIST Exceptions at 23. The question of who qualifies for preferential treatment as a hispanic is apparently unsettled. In incorporating a minority preference in the FCC's lottery authority (*see* 47 U.S.C. § 309(i)(3)(A) (1982)), Congress stated that "Office of Management and Budget Statistical Policy Directive No. 15 'Race and Ethnic Standards for Federal Statistics and Administrative Reporting' be utilized with regard to any dispute as to an individual's membership in a named group." H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 45 (1982) (Conference Report). In pertinent part, Directive No. 15 considers hispanic a "person of . . . Cuban . . . or other Spanish culture or origin. . . ." *Id.* (at p. 37).

tive.[59] We will deny KIST's exceptions to the ALJ's denial of parttime credit, for his analysis in the *I.D.* is clearly correct that KIST's request for "residual credit" for the two salesmen (including banker MacCauley who said he would help in sales) is not supported by precedent.[60]

28. Bethel, a nonstock corporation, was awarded 33.33% fulltime integration credit for the proposed participation of one of its three directors, Carl E. Vaughn, who would serve as the station's general manager.[61] KIST contends that although a director of a nonstock corporation is usually ceded integration credit in proportion to the number of directors (such directors being likened to principals or shareholders[62]), Vaughn should receive none here because the applicant "is completely controlled and dominated by Bethel Christian Center." Imposing an analysis similar to that used with Family and Sunland's integration proposals, KIST asserts that the "Center has provided all Bethel funding,"[63] "Bethel has no bank account," and its "funds remain in the account of the Center."[64] It also observes that the Chairman of the Center (by Bethel's by-laws) will always be a Bethel board member.[65] Family's exceptions make the same point.[66] Bethel does not deny the substance of the foregoing; instead it labels such "a patent attempt to

[59] *See I.D.*, para. 152 (no hispanic surname, little Spanish spoken, not a member of hispanic organizations, mother not hispanic).

[60] *See* KIST Exceptions at 23-27.

[61] *I.D.*, para. 155.

[62] *See, e.g., Farragut Television Corporation*, 8 FCC 2d 279 (1967).

[63] KIST Exceptions at 28.

[64] *Id.*

[65] *Id.*

[66] Family Exceptions at 34.

interject a real party-in-interest issue" at a belated procedural point.[67]

29. We will affirm the ALJ. In so doing, we must note at the outset that the *Henderson* and *Berryville* mode of analysis for filtering integration credit is not a particularly good fit in the case of nonstock entities. Most cases dealing with this issue involve either religious or educational applicants where a parent institution specially creates a new corporation, the sole purpose of which is to apply for and operate a broadcast station. *See, e.g., Roanoke Christian Broadcasting, Inc.*, 92 FCC 2d 1477, 1478-1479 (Rev. Bd. 1983) (fulltime participation by all four directors of nonstock corporation yields 100% integration credit); *see also Las Misiones, supra* (withdrawal of 1 of 3 directors reduces integration credit to 66%). When dealng with such entities, it is silently assumed that the directors of the applicant organization are not necessarily the financiers. Yet—for integration purposes—we have regarded those directors as tantamount to "principals." To do otherwise would, most likely, deprive such institutions of any opportunity for integration credit and, therefore, usually the license. Furthermore, in an early comparative case the Commission reversed the Board's denial of integration credit for directors of a nonstock corporation, which entity was controlled by a parent corporation (having common directors with the applicant corporation). *Farragut Television Corp., supra* note 62 8 FCC 2d at 282-283. Nothing here distinguishes Bethel from this line of cases, nor do the exceptors prove so. The management integration of one of Bethel's (three) corporate directors will be credited and the ALJ affirmed.

30. United has been disqualified on finances (*supra*, paras. 3-10), and we need not resolve the questions posed by the exceptions to its integration proposal.

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[67] Bethel Reply at 6-7.

31. *Comparison of Ownership Integration.* Having rejected the integration proposals of Family and Sunland (and finding it unnecessary to ruminate on the integration proposal of the disqualified United), the two leading applicants under this particular comparative criterion are KIST, which is afforded a 37.49% fulltime factor, and Bethel, with a corresponding 33.3% factor.[68] There being no clear quantitative difference between the two, *see, e.g., North Carolina Radio Service, Inc.*, 92 FCC 2d 621 (Rev. Bd. 1982), *review denied.* FCC 83-211 (mem.), released May 3, 1983 (Comm'n), any preference under this criterion depends upon the qualitative difference between the integration proposals. *See id.* In that regard, Bethel urges that it be preferred because of its integrated (33.3%) principal's "local residence and local civic involvement."[69] It relies, in part, on the fact that KIST's 29.16% local residence level is below its 33%. But, KIST is entitled to a very slight enhancement of its integration credit for its 4.17% female[70] and its 8.33% hispanic[71] principals. In light of the Commission's racial and sexual preference policies, KIST wins under the integration criterion, although we must say that its leading edge is relatively razor thin.

32. *Diversification of Control of the Media of Mass Communications.* The ALJ concluded that all of the re-

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[68] As indicated *supra*, neither KIST nor Bethel receives parttime credit.

[69] Bethel Exceptions at 17.

[70] *I.D.*, para. 152.

[71] *See supra* para. 27 according consideration of Carlos Fox's grand-paternal genotype. Even so, KIST's enhancement for these levels of FCC-favored racial and sexual characteristics is relatively slight, *see Alexander S. Klein, Jr., supra*, 86 FCC 2d at 428-429. As the Commission clarified recently, it "will continue to consider participating minority [and female] ownership which is less than controlling to the degree of minority [and female] ownership and participation represented." *Horne Industries, Inc.*, FCC 84-286, released July 20, 1984, at para. 6.

maining applicants were even under the diversification criterion. Except for Family, none of the other applicants nor their principals hold other media interests. *I.D.*, para. 148. With respect to Family, its *de facto* sole stockholder (*see supra*, paras. 12-21), Jack Dalton, became a "limited" partner subsequent to the B cut-off date in the proposed assignee of a construction permit in Springfield, Missouri for KSPR(TV), an assignment subsequently approved by the Commisison. The interest was not attributed to Family, however, because—prior to the consummation of the sale—Mr. Dalton expressly agreed to sell his interest and, in fact, did divest the Springfield interest shortly after the Commission approved the assignment. *See id.*, para. 150. Moreover, Ms. Emma L. Freeman, Family's secretary was a 2% stockholder of a construction permittee for a new television station at Reno, Nevada at the time Family filed its application. She has since sold her interest. The ALJ discounted the Reno interest because she has no ownership interest in Family nor, in his view, a position of managerial significance. *See id.* Sunland excepted, claiming that Family should have received some media diversification demerit for Dalton's and Ms. Freeman's interests.

33. We agree with Sunland to the extent that the remaining applicants are entitled to a very slight diversification preference over Riverside Family because of Dalton's "limited" partnership interest in the Springfield, Missouri construction permit. *See Greater Wichita Telecasting, Inc.*, 52 RR 2d 926, 928 (1984); *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 1049 (Rev. Bd. 1982). As a general matter, in order to prevent comparative "upgrading" after the legal deadline, we do attribute media interests to an applicant if its principals hold such interests on the "B" cutoff date unless the applicant submits an unequivocal commitment on or before that date to divest the interest upon grant of its application. *See, e.g., High Sierra Broadcasting, Inc.*, 55 RR 2d 627, 635 (Rev. Bd. 1983). Here, Dalton was

a principal of the Springfield applicant on April 14, 1982 (*see* United's amendment filed on April 23, 1982 reporting the Springfield interest), but the application was not granted until August 4, 1982, and that interest not sold until August 17, 1982. The Springfield interest must therefore be attributed to Family for diversification purposes. The ALJ acted correctly, however, in discounting Ms. Freeman's interest since, indeed, she is neither an owner of Family nor occupies any significant managerial interest. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 n.5 (1965).

34. *Auxiliary Power.* Sunland urges that the ALJ erred in rejecting its auxiliary power exhibit and in failing to accord it a comparative preference for its auxiliary power proposal. The ALJ rejected the exhibit on two grounds: (1) credit was not sought prior to the B cut-off date; and (2) auxiliary power credit is given only for AM and FM stations, not television proposals. *See* Tr. 408, 410, 438. Subsequent to that ruling, however, the Review Board accorded a television applicant a preference for its auxiliary power proposal. *See San Joaquin Television Improvement Corp.,* 54 RR 2d 1206, 1214 (Rev. Bd. 1983). KIST observes in its reply that it too tendered a similar exhibit, which was likewise rejected, and that if one applicant is awarded a minor enhancement for auxiliary power, then each of the applicants who proposed auxiliary power should be awarded the same credit. *See* KIST Reply 3-4. We will deny the exception. Although one ground supporting the ALJ's ruling has been vitiated by *San Joaquin Television Improvement Corp.,* the remaining basis warrants affirmance of the ALJ's ruling. That is, an applicant cannot "upgrade" its comparative position after the deadline for filing amendments as of right (the B cut-off date) has elapsed. *Birmingham Family, supra* note 9. None of the parties will receive a comparative preference for belated proposals of auxiliary power.

35. *Public File Issue.* By *Order*, FCC 82M-1645, released May 24, 1982, the ALJ added an issue against Family to determine whether it had violated Section 73.3526 of the Commission's Rules and, if so, the effect on its comparative qualifications to be a Commission licensee. That rule requires broadcast applicants to maintain a public inspection file containing the material specifically prescribed therein. The *I.D.* found that two application amendments were not placed into Family's inspection file in a timely manner. *I.D.*, paras. 47-49. He did not assess the applicant a comparative demerit, however, because there was no evidence of either an intent to conceal information or any harm to a member of the public, and also because the violation appeared to be *de minimis*. Sunland argues that a slight demerit is appropriate, *citing HLD&M Communications*, FCC 82D-64, released September 13, 1982 (ALJ). We disagree. In *HLD&M Communications*, several individuals, including a news reporter, requested to inspect the file over a multi-month interval and were unable to see the file because it was missing. A slight demerit was there assessed. Here, the violation was less serious, and was quickly remedied when the applicant was apprised that its public file was incomplete. *I.D.*, para. 146. Under the circumstances, we conclude that the ALJ properly declined to assess Family any comparative demerit. *See Gilbert Broadcasting Corp.*, 55 FCC 2d 579, 582 (Rev. Bd. 1975), where the Board refused to specify a public file issue on allegations that a single amendment was absent from the applicant's public file.

36. *Request for ex parte issue.* By petition of August 23, 1984, Family requested the addition of an issue to determine whether KIST has violated either Section 1.1225 or Section 1.1227(e) of the Commission's Rules barring the solicitation of *ex parte* contacts in an on-

going adjudicatory proceeding.[72] Family's petition was inspired by service on the parties of a copy of a letter from the Commission's Office of Managing Director to Congressman Alfred A. McCandless advising the Congressman of the status of this case and refusing to address the merits of the case by citing our *ex parte* rules.[73] The Congressman's inquiry had been stimulated by a request for assistance by KIST's Board Chairman, Edward G. Butler, who complained that the Board's deferral of this case pending the outcome of settlement negotiations between the parties was delaying a decision in this proceeding.[74]

37. Based on KIST's reply to Family's petition and our review of the material on record, we will not add the requested issue. Where the facts are not obscure or in dispute, an evidentiary hearing is not needed. *Stone* v. *FCC*, 466 F.2d 316, 322-323 (D.C. Cir. 1972). Both KIST and Butler admit that Butler solicited the assistance of Congressman McCandless in compelling a deci-

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[72] 47 CFR § 1.1225 bars the solicitation of *ex parte* contacts seeking to address the merits of a case; § 1.1227(e) goes so far as to bar the solicitation of *ex parte* contacts going to the status of a case.

[73] *See* Letter of August 15, 1984 from Edward J. Minkel (per Thomas P. Campbell) to the Honorable Alfred A. McCandless (Attachment to Family Petition).

[74] *See* Letter of July 23, 1984 from Edward G. Butler to Congressman Alfred A. McCandless which concluded: "Anything you could do to help would be greatly appreciated." It is explained that, following oral argument before the Board in which we suggested that the parties settle amicably, we were advised by letters of April 20, 1984 that the parties were attempting to negotiate a settlement of the case. Unfortunately, by letter of June 12, 1984, the Board was advised in writing by counsel that an agreement was unlikely, to which we responded that we would proceed to consideration of the case. *See* Letter of June 19, 1984 from Review Board Chief for Law, Allan Sacks, to Jonathan L. Weiner, Esq. (copies to counsel).

sion,[75] and Butler's letter to the Congressman might suggest to some a violation of Section 1.1277(e). But, as the court observed in the recent *Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982), the Commission's concern over status inquiries makes ". . . a necessary exception to the prohibition of *ex parte* contacts for congressional inquiries directed to administrative delay." *Id.*, at 129. *See also Davison Communications Corp.*, 53 RR 2d 223 (1983).[76] We recognize that the *Amigos Broadcasting* court was concerned that, although the written communications of record between the applicant and a U.S. Senator were inoffensive, certain oral conversations between the Senator's staff and FCC staff might have been explored more deeply.[77] Here, however, there is no evidence or claim of oral communications with decision-making FCC personnel.[78] None of the other

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[75] *See* KIST Opposition to Petition at 4-5; Butler affidavit of August 24, 1984 (Opposition, Attachment B).

[76] We note that while Butler complained to Congressman McCandless that our deferral of this case pending settlement negotiations has delayed the case, Congress itself recently relaxed 47 U.S.C. § 311(d) because of its view that settlements greatly expedite proceedings involving mutually exclusive applicants. *See* H. Rep. 97-765, 97th Cong., 2d Sess. 49-50 (1982). We agree with Congress and actively encourage settlements which would terminate a comparative case and telescope the delivery of new broadcast service. Ironically, Butler's actions have held up the release of this decision while we awaited the completion of the pleading cycle on the *ex parte* allegations and considered the claims and responses filed by the parties.

[77] *See* 696 F.2d at 130.

[78] We observe that Butler's letter to the Congressman might have skirted the merits when he complained that "[w]e have been given to understand that the Review Board hesitates to make a decision on this case because two of the applicants (including Sunland) have minority involvement, which could pose some legal problems." On the whole, however, and in context, it seems clear that Butler's communication to Congressman McCandless was directed to administrative delay.

parties seeks an *ex parte* issue, and Family has neither replied to KIST's opposition nor suggested that the record on this matter is either incomplete or inaccurate. Further inquiry over this matter would be doubtlessly unproductive.

CONCLUSION

38. Our ultimate choice of a permittee in this case is obviously hinged heavily on our rejection of the Family and Sunland ownership integration proposals. These are serious actions, we know, and a few final words of explanation may be due. We acknowledge that there may be some surface tension between the precedent (a) that demands a penetrating look beyond paper organizational constructs when the empirical evidence suggests a very different regime and where *de facto* control appears comfortably lodged in other quarters (*see Henderson* and *Berryville, supra*) and (b) recent Commission policies such as those discussed in the 1982 *Minority Ownership* statement noted in para. 20, *supra*, which accept the proposition that certain types of principals who contribute no venture capital to a particular applicant may still be considered "controlling," all other *prima facie* indicia being wholly congruent. Yet, beneath that surface, we believe that no fundamental inconsistency is present and that the Commission continues to demand that applicant principals who hold out to be substantial or controlling owners possess the *de facto* ownership interests (and not merely "nominal" interests) that their *de jure* status implies, particularly in the comparative setting where ownership integration and, now, minority or female enhancements loom so prominently. *See, e.g., West Michigan Broadcasting, supra* note 26. Because of that prominence in comparative licensing cases, we will continue to uniformly apply the *Henderson* and *Berryville* principles to help ensure the integrity of our policies and processes, a stated concern of the Commission in this delicate area. *See Minority Ownership In Broadcasting, supra,* 92 FCC

2d at 855 (Commission will be alert to reject "'sham' arrangements").[79] From the standpoint of minority ownership, we believe that nothing would more swiftly bury the Commission's preferential treatment policies in an avalanche of contumely than our uncritical acceptance of the applications of roving sharp-shooters such as Family's Jack Dalton of Tennessee who have cynically calculated that even, at worst, a minority share of a southern California television construction permit worth—right off the printing press—many millions of dollars is a sufficiently lucrative target and hoped to convert a bulls-eye into a multiple return on initial investment. Indeed, Dalton brashly admits that to be his game.[80] Sunland's Jack Hodin of Scranton, Pennsylvania, while less "philanthropic," is practically no different. Neither entrepreneur has the slightest interest in serving the "public interest" in Riverside, California; only their own interests in the fastest dollar west of Las Vegas.

39. All decisionally significant exceptions have been considered. KIST, Bethel and Sunland are entitled to a very slight preference over Family under the diversification criterion. Only KIST and Bethel have been credited with fulltime quantitative integration credit (37.49% and 33.3% respectively), entitling them to moderate integration preferences over the other qualified applicants. *See Nuance Corp.*, 85 FCC 2d 412, 419 (Rev. Bd. 1981), where an applicant with 26% fulltime integration credit received a moderate preference over an

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[79] Even in *Alexander S. Klein, Jr., supra,* where the gift of stock to the former minority employee was a mere 5%, the Commission stated that the ". . . proposal merits especially close scrutiny," 86 FCC 2d at 430, and that the prospect of exploitation of the Commission's racial preference policy there was "troublesome." *Id.*, at 431.

[80] *See I.D.*, para. 105 (*citing* Tr. 2274); *see also* Tr. 2276-2277 (Dalton testifies that despite personally bearing all expense of prosecuting application and constructing station, his marginal share of a potentially winning applicant was better than "nothing.")

applicant with no fulltime integration credit. And KIST prevails over Bethel on integration criterion because of its slightly superior qualitative attributes. *See supra* para. 31. No other preferences or demerits have been given. Having weighed these factors, we find that KIST is the preferred applicant under the Commission's comparative *Policy Statement.* While its margin over Bethel is very narrow, it nonetheless in enough to win. *See Alexander S. Klein, Jr., supra,* 86 FCC 2d at 432 (5% minority-female ownership by winning applicant is dispositive).

40. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed by United American Telecasters, Inc. on February 17, 1984, IS GRANTED, and the amendment IS ACCEPTED, and that its petitions for leave to amend filed on April 23 and August 15, 1984, ARE DISMISSED as moot; that the petitions for leave to amend filed March 20 and May 14, 1984, by Riverside Family Television, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and the petition for leave to amend filed August 29, 1984, by KIST Corp. IS GRANTED, and the amendment IS ACCEPTED; and

41. IT IS FURTHER ORDERED, That the Request for Official Notice and Contingent Petition to Enlarge and to Reopen the Record filed December 29, 1983, by Riverside Family Television, Inc. IS DISMISSED; that the Contingent Motion to Reopen the Record and to Enlarge the Issues Against United American Telecasters, Inc. filed December 30, 1983, by Sunland Communications Company IS DISMISSED; that the Contingent Petition to Reopen and Record filed March 6, 1984, by KIST Corp. IS DISMISSED; and that the Contingent Petition to Add Ex Parte Issues filed August 23, 1984 by Riverside Family Television, Inc. IS DENIED; and

42. IT IS FURTHER ORDERED, That the application of KIST Corp. (File No. BPCT-810717KK) for authority to construct a new television station in Riverside,

California, IS GRANTED; that the applications of Sunland Communications Company (File No. BPCT-810720KL), Bethel Broadcasting, Inc. (File No. BPCT-810720KM), Riverside Family Television, Inc. (File No. BPCT-810720KO) and United American Telecasters, Inc. (File No. BPCT-810720KQ) ARE DENIED; and that the applications of Ettlinger Broadcasting Corporation (File No. BPCT-810720KK) and Channel 62, a Limited Partnership (File No. BPCT-810720KN) ARE DISMISSED.

/s/ Norman B. Blumenthal
NORMAN B. BLUMENTHAL
Member, Review Board
Federal Communications Commission

**APPENDIX F**

FCC 83D-60
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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IN RE APPLICATIONS OF

BC Docket No. 81-863
File No. BPCT-810717KK
KIST CORP.
Riverside, California

BC Docket No. 81-866
File No. BPCT-810720KK
ETTLINGER BROADCASTING CORPORATION
Riverside, California

BC Docket No. 81-867
File No. BPCT-810720KL
SUNLAND COMMUNICATIONS COMPANY
Riverside, California

BC Docket No. 81-868
File No. BPCT-810720KM
BETHEL BROADCASTING, INC.
Riverside, California

BC Docket No. 81-869
File No. BPCT-810720KN
CHANNEL 62, A Limited Partnership
Riverside, California

BC Docket No. 81-870
File No. BPCT-810720KO
RIVERSIDE FAMILY TELEVISION, INC.
Riverside, California

BC Docket No. 81-871
File No. BPCT-810720KQ
UNITED AMERICAN TELECASTERS, INC.
Riverside, California

For a Television Construction Permit

## APPEARANCES

*James E. Greeley* and *Peter Gutmann*, on behalf of Kist Corp.; *Stanley S. Neustadt* and *Robert C. Burns*, on behalf of Ettlinger Broadcasting Corporation; *Todd D. Gray, Daniel W. Toohey, Linda Hicks* and *John R. Feore, Jr.*, on behalf of Sunland Communications Company; *Edward J. Smith, Jr.* and *A. Thomas Carroccio*, on behalf of Bethel Broadcasting, Inc.; *A. Harry Becker*, on behalf of Channel 62, A Limited Partnership; *Jonathan D. Blake, John J. McKetta, III*, and *Jonathan L. Weiner*, on behalf of Riverside Family Television, Inc.; *Seymour M. Chase, Joyce L. Ausbeck, Harry F. Cole, David F. Tillotson* and *Pamela Stanton Baron*, on behalf of United American Telecasters, Inc.; and *Stephen Yelverton*, on behalf of the Mass Media Bureau, Federal Communications Commission.

## INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: October 27, 1983 Released: November 4, 1983

### *Preliminary Statement*

1. This proceeding involves the mutually exclusive applications of Kist Corp. (Kist), Ettlinger Broadcasting Corporation (EBC), Sunland Communications Company (Sunland), Bethel Broadcasting, Inc. (Bethel), Channel 62, A Limited Partnership (Channel 62), Riverside Family Television, Inc. (Family) and United American Telecasters, Inc. (United), each seeking authorization to build a new television station to operate on Channel 62 at Riverside, California.[1]

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[1] Applications by Riverside Telecasters, Inc., Pan-Pacific Broadcasting, Inc. and Focus Broadcasting of Riverside, Inc. were dismissed by the Presiding Judge with prejudice pursuant to each applicant's request. *Order*, FCC 82M-1373 (released April 28, 1982; and *Order*, FCC 82M-2471 (released August 13, 1982).

2. In the Hearing Designation Order, 46 *Fed. Reg.* 62936 (December 29, 1981, the Commission, by the Chief, Broadcast Bureau, designated the competing applications for hearing in a consolidated proceeding on the following issues: [2]

(1) To determine with respect to Sunland Communications Company:

(a) whether the applicant has available an additional $2,026,593 for its construction and three month operating costs;

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(2) To determine with respect to Bethel Broadcasting, Inc.:

(a) whether the applicant has available an additional $1,327,800 for its construction and three month operating costs;

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(3) To determine with respect to Channel 62, A Limited Partnership:

(a) the information required by Tables I and II, Section II, FCC Form 301 with respect to officers, directors, an stockholders of Channel 62, Incorporated and the Greater Riverside Chambers of Commerce;

(b) the information required by questions 17 (1)-17(4), Section II, FCC Form 301;

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[2] The issues directed at the three applicants who are no longer parties to this hearing are not enumerated.

(c) whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is legally qualified;

(d) the cost of purchasing or leasing land for 15 months;

(e) whether the applicant has available an additional $1,206,365 plus the costs of purchasing or leasing the land;

(f) whether, in light of the evidence adduced pursuant to (d) and (e) above, the applicant is financially qualified.

(4) To determine with respect to United American Telecasters, Inc.:

(a) whether the applicant has available $2,187,285 for its construction and three month operating costs;

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(5) To determine whether there is a reasonable possibility that the tower heights and locations proposed by Sunland, Bethel, and United would constitute a hazard to air navigation.

(6) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(7) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. By *Order*, FCC 82M-1645 (released May 24, 1982), the Presiding Judge added the following issues with respect to the applicants who remain parties to this proceeding:

(6) To determine whether Bethel Broadcasting, Inc. has violated Section 73.3514 of the Commission's

Rules and, if so, the effect thereof on this applicant's comparative qualifications to be a licensee of the Commission.

(7) To determine whether Channel 62, A Limited Partnership has violated Section 73.3514 of the Commission's Rules and, if so, the effect thereof on the applicant's comparative qualifications to be a licensee of the Commission.

(8) To determine whether Channel 62, A Limited Partnership has violated Section 73.3526 of the Commission's Rules and, if so, the effect thereof upon the applicant's basic or comparative qualifications to be a Commission licensee.

(9) To determine whether the staff proposed by the Ettlinger Broadcasting Corporation is adequate to effectuate its operating proposals and, if not, whether this applicant is qualified to be a licensee of the Commission.

(10) To determine whether Riverside Family Television, Inc. has violated Section 73.3526 of the Commission's Rules, and, if so, the effect thereof upon the applicant's comparative qualifications to be a Commission licensee.

(11) To determine whether the applicant and subsequent amendments of Sunland Communications Company were executed and certified in accordance with the Commission's requirements and, in light of the evidence adduced, the effect thereof on the applicant's basic or comparative qualifications to be a licensee of the Commission.[3] [4]

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[3] The added issues have been numbered 6-1 and present issues 6-7 will be renumbered 12 and 13.

[4] The burdens of proceeding and proof on added issues 6, 7, 9, 10 and 11 were placed on the respective applicants. The burden of proceeding on added issue 8 was placed on Pan-Pacific, with the burden on proof placed on the applicant.

4 By *Order*, FCC 82M-1410 (released May 3, 1982), the Presiding Judge granted a "Motion for Summary Decision" by United on the air hazard issue (Issue 5) and resolved that issue in United's favor. By *Memorandum Opinion and Order*, FCC 82M-2394 (released August 3, 1982, the Presiding Judge granted Sunland's "Motion for Summary Decision" on the certification issue (Issue 11) and resolved that issue in Sunland's favor. By *Order*, FCC 82M-2786 (released September 14, 1982, the Presiding Judge granted Sunland's "Motion for Summary Decision" on the financial issue (Issue 1) and resolved that issue in Sunland's favor.

5. Prehearing conferences were held on March 17, 1982, April 2 and 28, May 10, 1982 and July 16, 1982. Admissions sessions were held on September 8 and 9, 1982. Hearing sessions were conducted on September 14, 15, 16, 17, 20, 21, 22, 23, 24, 28 and 29, 1982. A posthearing conference was held on October 14, 1982. A rebuttal hearing session was conducted on October 20, 1982. The record was closed by Order released January 27, 1983 (FCC 83M-354). Proposed findings of fact and conclusions of law were filed by the applicants on January 7, 1983 and reply findings and conclusions were filed on February 18, 1983.[4a]

### *Findings Of Fact*

### *Qualification Issues*

#### *Issue 2—Bethel Financial Qualifications*

6. Bethel's cost of constructing and operating its proposed station through the first three months on the air

[4a] A "Motion To Enlarge" was filed April 15, 1983 by Channel 62. An opposition was filed April 28, 1983. A "Petition To Reopen The Record And To Enlarge The Issues" was filed April 27, 1983 by KIST. Responsive pleadings were filed on May 11, 1983. The motion and the petition were denied by *Order*, FCC 83M-1930, released June 14, 1983.

will be $1,408,550. (Bethel Ex. 4). From its proposed equipment supplier, Bethel will have available net deferred credit totaling $759,656. (Bethel Ex. 4). JP Associates, Bethel's proposed equipment supplier, is an established supplier capable of meeting its commitment to Bethel. (Bethel Ex. 10). This capability is confirmed by the stated willingness of Bogner Broadcast Equipment Corp. and Harris Corporation to provide their equipment to JP Associates on deferred credit basis (Bethel Ex. 12). Bethel also has available to it existing capital in the amount of $10,000. These earmarked funds are retained on deposit at Security Pacific National Bank (Bethel Ex. 4).

7. Bethel's president, Carl E. Vaughn, undertook to obtain a commitment for the additional funds, approximately $638,894, necessary to meet Bethel's construction and first quarter operating costs (Tr. 1348-50). On December 23, 1982, DeAnza National Bank, together with Golden Pacific National Bank and Gateway Western Bank, issued a commitment letter for a participation loan to Bethel in the amount of $750,000. As repayment of that loan will not begin until 120 days after the proposed station begins operation, the full amount of the loan will be available to Bethel.

8. On January 5, 1983, Bethel proffered both an amendment to the financial portion of its application and a reformed Hearing Exhibit No. 4 (Financial Qualifications). The application amendment and the reformed hearing exhibit demonstrate Bethel's ability to meet its financial requirements of $1,408,550 by relying on existing capital ($10,000), deferred equipment credit ($759,656) and the loan commitment ($750,000), which totals available financial resources of $1,519,656. (Reformed Bethel Ex. 4).

*Issue 3(a) to (c)—Channel 62 Legal Qualifications*

9. A legal qualifications issue was specified against Channel 62 on the basis of missing information in Sec-

tion II of its application. Missing was the Table I and Table II information for the officers, directors and shareholders of Channel 62, Incorporated and the Greater Riverside Chamber of Commerce (Chambers). Chambers holds 100% of the stock of Channel 62, Incorporated. Also missing was the information required by questions 17(1) through 17(4) of Section II relating to the other media interests of such officers, directors and shareholders of Channel 62, Incorporated and the Chambers.

10. The information has been supplied by Channel 62 in amendments and in Channel 62 Exhibits 2, 4, 5, 6 and 7. This information is reflected in the description in the Channel 62 applicant found at Findings 91-94 infra.

*Issue 3(d) to (f)—Channel 62 Financial Qualifications*

11. The Designation Order, 46 Fed. Reg. at 62938, determined that Channel 62's cost of construction and operation for three months would be $1,268,143 plus the cost of purchasing or leasing land for five months. According to Channel 62 Exhibit 18, the cost of rental for the station's studio facilities would be $2,500 per month, while the cost for leasing the transmitter site would be $1,000 per month. The total cost to construct and operate this station for three months would thus be:

| | |
|---|---|
| Cost in designation order | $1,268,143 [5] |
| Rental of studio facilities (5 months) | 12,500 |
| Rental of transmitter site (5 months) | 5,000 |
| | $1,285,643 |

12. To meet this cost of $1,285,643, Channel 62 proposes to rely on $150,000 from its limited partners and a bank loan in the amount of $2,000,000 from the Riverside National Bank.

[5] This amount includes the $350,000 downpayment and the $119,875 representing four installment payments on the Harris equipment credit package, as well as $187,610 for equipment to be purchased for cash.

13. With respect to its reliance on its limited partners for contributions of $150,000 toward the prosecution of its application, Channel 62 has submitted balance sheets for each of its proposed contributors showing the availability of funds to make their respective capital contributions. While these balance sheets, in some cases, were somewhat dated, Channel 62 submitted affidavits from these individuals stating that the submitted balance sheets reflected their current financial position (Channel 62 Exs. 19-29; 33-41).

14. Channel 62 submitted a letter from the Riverside National Bank dated January 29, 1982 stating that the bank "would be pleased to consider participating in a loan of $2,000,000." (Channel 62, Amended Ex. VI). The bank qualified its participation by noting that it "would be conditioned upon our ability to review and approve the financial details of this loan prior to funding, including but not limited to proposed guarantors, collateral availability and cash flow requirements. Moreover, since we are unable to totally fund your request ourselves, the bank's participation will be predicated upon our ability to obtain additional participants willing to accept the proposed terms." (*Id.*).

15. Subsequently, in response to questions raised at the hearing, Channel 62 submitted two further letters from the Riverside National Bank clarifying some of the terms of the first letter. The bank stated in its letter dated September 10, 1982 that its legal lending limit was currently $600,000 (Channel 62 Ex. 32), and that "Riverside National Bank has engaged in loan participation in the past, although our participations were somewhat smaller than the Channel 62 proposal." (Channel 62 Ex. 42). Finally, the bank stated in its letter dated October 1, 1982 that it "would consider a deferment of interest as well as principal," provided "such deferment could not exceed six months from the initial date of funding of the proposed loan." (Channel 62 Ex. 42).

16. Channel 62 declined to call a bank official to testify on its behalf. Arthur Pick, one of Channel 62's general partners,[6] testified to the best of his knowledge that the bank had not contacted any other banks regarding their participation in the proposed loan to Channel 62 (Tr. 1876).

*Issue 4—United Financial Qualifications*

17. United is required to show the availability of at least $2,182,550 for its construction and first-three-months operating costs. To make this showing, United is relying upon net deferred equipment credit of $877,500 (which is not contested) and a $2,000,000 loan from the West Olympia Bank (a California bank) which, after subtracting interest payments for the first year, would yield United $1,680,000. (United Ex. 1). United is not relying upon any contributions from its shareholders and no statement regarding its shareholders' financial condition were submitted. United's principals have stated that if necessary they will personally guarantee and provide collateral for a loan to United (Tr. 2445, 2515-16, 2606-7, 3892, 2936-37, 2977), but no showing has been made regarding the amount of collateral which could be made.

18. The August 26, 1982, West Olympia Bank letter upon which United relies states that if United's application is granted, the bank is "prepared to syndicate loans with our correspondent banks to extend your company in sums up to $2,000,000 for the construction and operation of the station." The letter goes on to state, "[e]ach loan will, of course, be subject to the condition that all reasonable and ordinary credit criteria of the bank are met

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[6] The other general partner is Channel 62, Incorporated, a California business corporation, the stock of which is owned 100% by the Greater Riverside Chambers of Commerce (Chambers), a non-profit corporation (Tr. 1905). Pick is Executive Vice President of the Chambers (Channel 62 Ex. 1).

at the time you request a formal leading commitment." (United Ex. 1, Attachment A).

19. By banking standards, the West Olympia Bank is a relatively small bank, with $22,000,000 in assets (Tr. 2314). Its credit limits are correspondingly small—approximately $150,000 to $160,000 for unsecured loans and $300,000 for secured loans (Tr. 2315, 2266, 3323). These limits are imposed by the state law under which the bank is chartered. Secured loans would normally be those with sufficient collateral in the nature of bank accounts or first trust liens, or loans guaranteed by government agencies (Tr. 2316, 3323). Loans would be considered unsecured where there is no collateral, where there is a second trust on property (Tr. 2315-16), where the collateral is stock in a closed corporation (Tr. 2323), or where there is merely personal guarantees (Tr. 2316). Gook Sun Han, a Director and 25% stockholder of United and a Director of the West Olympia Bank and member of its senior loan committee (United Ex. 8, pp. 1-2), testified that the largest loans he was aware of the bank having made were in the range of $180,000 to $200,000 (Tr. 2455).

20. The West Olympia Bank could not, on its own, loan United the $2,000,000 United has requested. Thus, as indicated in its letter to United, the bank would have to syndicate the loan to several other banks in order to come up with the money required by United. Before participating in a loan, the other banks would require information relative to the credit worthiness of the applicant (Tr. 3273). The bank has made no arrangements whatsoever to syndicate United's loan at this time (Tr. 3277). Although Mr. J. T. Kim expressed confidence that the bank could syndicate the loan, the bank has never managed a participatory loan in his experience. (*Id.*)[7]

[7] According to Ms. Woo-Chang Lee England, Vice President and loan officer, the bank has participated in loans syndicated by other banks (Tr. 2325-26).

21. The August 26 bank letter does not contain any specific reference to a requirement of collateral for the loan. An August 16 letter from the bank to United however, stated that a loan from the bank to United would require "satisfactory collateral." (Family Ex. 13). The author of the August 16 and August 26 letters, Mr. J. T. Kim, stated that the term "collateral" was deleted from the second letter because the bank had additional criteria which would have to be met before taking down the loan, all of which could not be expressed in the letter, and he thought it would be more appropriate simply to say more generally that the loan would be subject to "the ordinary credit criteria of the bank." (Tr. 3258-59). Mr. J. T. Kim stated that general banking practice would require collateral and that such banking practices are part of his bank's credit criteria (Tr. 3335). While stating that no definite decision had been made regarding whether the bank would ask for collateral or what amount, Mr. J. T. Kim stated that as far as he was concerned, the bank should ask for collateral (Tr. 3264-65). Based on present practices, collateral for a $2,000,000 loan would be in the order of approximately $3,000,000 (Tr. 3293). The decision on whether or not to ask for collateral will be made by the bank's loan committee (Tr. 3264) which has not yet considered the loan in question (Tr. 3352).

22. As of the time of the hearing, the West Olympia Bank had very little information regarding United. Thus, it had neither received nor reviewed personal income statements, personal balance sheets or any statement of the net worth of United's respective principals, nor had it ever seen a balance sheet or statement of net worth from United (Tr. 3278). In addition, the bank was unaware of the fact that United's equipment supplier would have a first lien on United's equipment (Tr. 3295). The only financial material received by the bank were projections of income and expenses from the United station should the application be granted (Tr. 3353-55).

23. Mr. Han [7a] was instrumental in acting as in intermediary between United, with which he was about to become formally associated, and the bank in obtaining a loan letter (e.g., Tr. 3241-42). Under the California Financial Code, in the absence of special security arrangements (not indicated here), a bank cannot give a loan in excess of $25,000 to a corporation of which one of the bank's directors holds 10% or more of the stock. *Cal. Financial Code* § 3371 (West 1981 and 1982 Supp.). Mr. Han stated that if it is necessary, he will resign from the bank so that United can obtain a loan (Tr. 2444-45).

*Issue 5—Sunland, Bethel Air Hazard*

24. Sunland proposes a tower site at the Sunset Ridge Electronics site, three miles northwest of San Antonio Heights in Los Angeles County, California. On January 22, 1982, the FAA issued its determination of "no hazard" with respect to Sunland's proposed tower (Sunland Ex. 6).

25. By amendment accepted by *Order,* FCC 82M-1410 (released May 3, 1982), Bethel specified a transmitter site located immediately adjacent to existing communications towers and buildings on Skyland Peak near Crestline, California. On May 5, 1982, the Federal Aviation Administration issued its determination that Bethel's proposed tower and antenna would not constitute a hazard to air navigation (Bethel Ex. 8 at 1, 2).

*Issue 6—Bethel Violation of Section 73.3514*

26. Bethel's application on FCC Form 301 contained the following omissions: (1) the information required by Items 4(a) and 4(e) of Section III; (2) a response to

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[7a] As previously noted, Mr. Han is a Director and 25% stockholder of United and a Director of the West Olympia Bank and member of its senior loan committee.

Item 23 of Section IV-B; (3) exhibits E-3 and E-4; and (4) responses to Items 15 and 16 of Section V-C (Bethel Ex. 6 at 1). These deficiencies in Bethel's original application were corrected by amendments filed by Bethel on January 28, 1982 and March 24, 1982 (Bethel Ex. 6 at 1).

27. In 1977, Bethel decided to seek a television broadcast station to serve Riverside, California. At that time, they retained an attorney to act as Washington communications counsel. Bethel relied upon that counsel both to guide it through the rulemaking allocating Channel 62 to Riverside, and to guide Bethel with regard to any application (Bethel Ex. 6, pp. 1-2). However, not known to Bethel, its original counsel was disbarred from the practice of law, and abandoned his practice (Ex. 6, p. 2 and Tr. 1407-8).

28. Bethel's principals were unaware of any application activity regarding Channel 62 until July 1981, when its president, Carl E. Vaughn, noticed an article on the subject in the *Riverside Press Enterprise.* So alerted, Bethel contacted its Washington counsel, who stated he had ceased handling communications matters and would not assist Bethel in the application process (Ex. 6, p. 2).

29. Upon learning of its abandonment by original counsel, Bethel contacted substitute counsel on the afternoon of July 14, 1981, four business days before the "A" cut-off date. Under the direction of new counsel, Mr. Vaughn gathered available material and information and flew to Washington, D.C. on the cut-off date, July 20, 1981. Working with counsel, and making every effort to prepare a complete and accurate application, Bethel prepared and filed its application that day (Bethel Ex. 6 and Tr. 1397).

30. Within 10 days after filing its application, Mr. Vaughn reviewed the application, but did not notice any omissions (Tr. 1398). Mr. Vaughn also discussed the

engineering portion of the application with Bethel's consulting engineer, who was relied on for guidance on all technical matters, but received no indication of any need to amend or supplement the engineering submission (Tr. 1420-21). Further, Mr. Vaughn reviewed the application in anticipation of the "B" cut-off. As a result of that review, an amendment was prepared and filed on the "B" cut-off date (Tr. 1419).

*Issue 7—Channel 62 Violation of Section 73.3514*

31. The Channel 62 application as filed did not contain certain information required by Section II of FCC Form 301. It was missing the Table I and Table II information for the officers, directors and shareholders of Channel 62, Incorporated and the Chambers. It was also missing the information required by questions 17(1) through 17(4) for the officers, directors and shareholders of Channel 62, Incorporated and the Chambers.

32. This information was supplied by Channel 62 in amendments dated July 12, 1982 and August 13, 1982 (Tr. 1971). Mr. Pick explained that it took so long for Channel 62 to supply the missing information because much of it came from volunteers. The Chambers must rely on the sense of responsibility of its members. Some of them come to the organization fully prepared to respond to its needs with due diligence. Others are reluctant to participate actively. Also, various Channel 62 participants needed to consult with their attorneys and accountants concerning the project. It therefore took a considerable period of time to collect this information (Tr. 1971-72).

*Issue 8—Channel 62 Violation of Section 73.3526*

33. On January 12, 1982, Mr. David Bantle, an employee of a principal of Pan-Pacific Broadcasting, Inc., which at the time was a competing applicant in this proceeding, visited the offices of the Greater Riverside Chambers of Commerce in order to inspect the public file

of Channel 62 which was to be located there (Tr. 3202). Mr. Bantle approached individuals working in the other office and asked to see the public file for Channel 62 (Tr. 3202-03). Although Mr. Bantle could not remember the precise wording of the conversation, he testified that one of the individuals to whom he spoke asked him if he worked at the Federal Communications Commission to which he responded that he did not (Tr. 3204). The individuals with whom Mr. Bantle spoke apparently did not understand what the public file was (Tr. 3209) and told Mr. Bantle that he would have to speak with Mr. Pick, Executive Vice President of the Chambers and Corporate Secretary of Channel 62, Inc., one of the general partners of Channel 62 (Tr. 3205).

34. When Mr. Bantle returned, he spoke to Mr. Pick's secretary and against asked to see the public file for Channel 62 (Tr. 3211). Mr. Pick's secretary was about to give the public file to Mr. Bantle, when Mr. Pick, who was in an adjoining room, interrupted and told her not to do so (Tr. 1483, 3212). Mr. Pick asked Mr. Bantle for identification and Mr. Bantle provided him with his driver's license (Tr. 1985, 3213-14). There was also apparently some discussion between Mr. Bantle and Mr. Pick regarding whether Mr. Bantle was a representative of the Federal Communications Commission, although the precise exchange between Mr. Bantle and Mr. Pick on this subject is in dispute (Tr. 1488, 1985, 3215-16). Mr. Pick told Mr. Bantle that he would have to consult with his Washington counsel, and if proper, Mr. Pick would make the files available to Mr. Bantle on the following day (Tr. 1426, 3216). Mr. Pick spoke with his counsel soon thereafter and was instructed to make the files available to Mr. Bantle (Tr. 1426). Mr. Bantle, however, did not return to look at the files (Tr. 3217).

35. Mr. Pick testified that he did not give the files to Mr. Bantle immediately because he was under the impression that Mr. Bantle had previously misrepresented

himself as being from the Federal Communications Commission (Channel 62 Ex. 1, p. 10).

*Issue 9—EBC Staffing*

36. EBC proposes a staff for its television station of 6 full-time and two part-time employees. The staff would be broken down as follows:

| Number | Position | Time |
|---|---|---|
| 1 | General Manager | full-time |
| 1 | Bookkeeping/Traffic | full-time |
| 1 | Sales Manager | full-time |
| 3 | Engineering/Technical | full-time |
| 1 | Engineering/Technical | part-time |
| 1 | Salesman | part-time |

37. The station is proposed to be on the air 7 days each week, 12 to 13 hours per day (12:00 Noon through 1:00 a.m.). EBC contemplates that it will seek an STV operator to program the station from 8:00 p.m. through the end of the broadcast day (Tr. 991-92). EBC proposes to have only a limited amount of programming which will be produced at the station. This will be a nightly ten-minute news program and a weekly one hour talk show produced and announced by EBC's General Manager, Kathleen Keep (Tr. 1017, 1202-3, 1212).

38. With respect to Ms. Keep, the proposed General Manager, EBC proposes that she would perform the functions of station manager, news and public affairs director and program director (EBC Ex. 4 at 1). Testimony elicited at the hearing shows that Ms. Keep will have at least the following specific duties at the station: ascertainment (Tr. 1004); representing the station in the community (Tr. 1032); going into the community to gather information for the station's news and public affairs programming (Tr. 995, 1218); editing, producing, writing scripts, and doing the on-air portions of the news and public affairs programming (Tr. 995, 1192); scheduling the station's programming (Tr. 1215); answering

telephones, preparing agendas for station personnel and other menial tasks (Tr. 1191); and supervising all station employees (Tr. 987). Ms. Keep has never done TV program production work (Tr. 1192).

39. The engineering staff presence during the week is as follows:

| | | |
|---|---|---|
| Monday - Friday: | | |
| Until 6:00 p.m. | — | 1 studio engineer<br>1 ENG and studio engineer |
| 6:00 p.m. 6:30 p.m. | — | 2 studio engineers<br>1 ENG and studio engineer |
| After 6:30 p.m. | — | 1 studio engineer |
| Saturday and Sunday: | | |
| Until 6:00 p.m. | — | 1 studio engineer |
| 6:00 p.m. - 6:30 p.m. | — | 2 studio engineers |
| After 6:30 p.m. | — | 1 studio engineer |

(EBC Ex. 4)

40. The station's transmitter will be located on Box Springs Mountain in Riverside (Tr. 1007). The maintenance of the transmission equipment will be handled for a flat fee by an engineer/employee of Telas Broadcasting, which already uses the site for transmission (Tr. 1054-55).

41. The station engineers, in addition to maintaining and operating the station's broadcast equipment, will operate the cameras and studio production equipment during taping of public affairs/news segments (Tr. 1193) and commercials (Tr. 1075). One engineer will also take requests for announcements and civic appearances (Tr. 1032). In the absence of the General Manager, the engineer on duty will be in charge of the station (Tr. 1192). Also, each weekday one engineer will be assigned to ENG work, including coverage of local events and some reporting of same (Tr. 1076-78). This activity is expected to keep the ENG engineer away from the studio for the better part of the day. *Id.* In case of failure of studio equipment, programming would be switched to a standby

tape machine while the station awaits arrival of its part-time engineer responding to an emergency call (Tr. 1196, 1054). Plans for dealing with technical difficulties arising when the part-time engineer is alone on duty (Saturday and Sunday, 6:00 p.m. to the end of the broadcast day) or otherwise occupied (doing ENG work Mondays and Tuesdays or unavailable during his off hours) apparently have not been made. There was no testimony as to handling transmitter difficulties. Engineers' absences due to vacations and illness will be covered by the part-time (32 hour) engineer working on a full-time basis (Tr. 1000-1001).

42. As to the engineering staff required for the taping of the programs and commercials produced by the station, John Ettlinger[8] initially stated that all such pre-taping would require the presence of three engineers (Tr. 999). He later modified this opinion, stating that three engineers (two manning cameras and one in the control room) would only be necessary during the "interview portion" of the program (Tr. 1018). Ms. Keep indicated that for the one hour interview show (that she expects to produce) three engineers would be needed in the studio and that she presumed they would spend more than one hour working to make an hour of programming (Tr. 1193, 1202-3). For the technical production of commercials a one-man crew would be used (Tr. 1075-6).

43. Ms. Keep testified that the interviews would generally be of three or four individuals (Tr. 1238-9). She and Mr. Ettlinger accept that taping must be done at the convenience and contingent to the avilability of the guests (Tr. 999, 1193). However, Mr. Ettlinger expected the interviews to be taped on Saturday or Sunday evenings (Tr. 1017). Ms. Keep stated that the engineers' schedules will provide adequate time for them to carry out their functions (Tr. 1194). She then referred to the

[8] Mr. Ettlinger, who holds 60% of EBC's stock, (EBC Ex. 1) sponsored the staff exhibit.

one-half hour projected overlap in the weekday schedules during which time three engineers would be on hand (Tr. 1195). However, she refused to say that this half-hour would be sufficient for the station's taping activity, maintaining that "Mr. Ettlinger's idea of this, presenting this to you is obviously going to change." *Id.* She indicated that the schedules will be "fluctuated" as necessary. *Id.* In response to a question as to the number of hours a week expected of the engineers, Ms. Keep referred to a part-time engineer (other than the 32 hour individual) whose hours "will be determined by necessity" (Tr. 1220-21). Neither EBC's staffing proposal (EBC Ex. 4) nor its engineering schedule indicate a fifth engineer.

44. The weekday news program would require the ENG engineer to be outside the studio "more than he would be in" (Tr. 1076-7). The ten-minute program would require "about an hour and a half" preparation in the studio before airing. *Id.* That preparation "is strictly assigned" to the ENG engineer. *Id.* Ms. Keep would need two engineers for the taping or live production of the non-ENG portion of the program (Tr. 1203). She anticipates that one hour should be set aside for this activity (Tr. 1202-3, EBC Ex. 4, attachment). In response to a question as to plans for covering urgent local events (natural disasters, etc.), Mr. Ettlinger admitted that such a possibility had not been considered in the staff proposal (Tr. 1077-78). As presently proposed, the staff could not produce more than 15 minutes daily coverage of local public affairs (Tr. 996, 1023-24, 1080).

45. EBC intends to solicit and air local, regional and national advertising (Tr. 1058-59). The sales staff will consist of one full-time manager and one part-time salesman (EBC Ex. 4, p. 1). Mr. Ettlinger acknowledged that since the station will be the first local Riverside television outlet [9] it will have the added burden of "educat[ing] advertisers in the area to utilize the media." (Tr. 997).

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[9] Riverside has a population of 170,876.

There will be no member of the staff especially charged with promoting the new station (Tr. 1031). (However, Ms Keep, in addition to her other duties, will "go out and speak at Rotary and other functions" and appear at lunches and functions (Tr. 1032). Mr. Ettlinger could not estimate the volume of commercial announcements anticipated during the first year of operation (Tr. 1063).

46. Mr. Ettlinger admitted that he overlooked a secretary/receptionist in his staffing proposal and that a secretary/receptionist would have to be added within 30 to 60 days (Tr. 1084).

*Issue 10—Family Violation of Section 73.3514*

47. Two amendments to the Family application, dated October 1, 1981 and October 20, 1981, were not placed in the Family public inspection file in a timely manner (Tr. 2238). Jack Dalton, Family principal, was responsible for the public file. He had an arrangement with his communications consultants, Sterling Communications, that they would send all materials for the public file to Mr. Dalton and he would then forward them to the public file at the Riverside Public Library (Family Ex. 6 p. 2, Tr. 2236). Mr. Dalton never received copies of these two amendments; thus he did not forward them to the Riverside Public Library (Family Ex. 6, 2). In fact, the materials were not placed in the public file until a paralegal at Family's law firm (Family's new counsel) mailed the materials to the Public Library on February 16, 1982 (Family Ex. 3, p.2).

48. Mr. Dalton testified that he was involved in the preparation of at least one of the two amendments, and that he was aware that it had been filed (Tr. 2246, 2260-61). However, when he did not receive a copy of the amendment from Sterling, he did not ask them for a copy (Tr. 2247). He testified that he simply depended on them to send him a copy (Tr. 2261, 2266). He assumed that if the amendments were required to be placed in the file, Sterling would forward them to him with a letter informing him that the material should be placed in the public

file (Tr. 2262). At the time, Mr. Dalton was not aware that all amendments to Family's application had to be placed in the public file (Tr. 2262).

49. Arrangements have now been made to forward all amendments to the Family application to its public inspection file at the Riverside Public Library (Family Exs. 4-6). Checks are made periodically with the librarian of the Public Library Reference Desk where the files are kept to make sure the public file remains complete and up to date (Family Exs. 4-6).

*Comparative Issue*

*Kist Corp.*

50. Kist, a California corporation, consists of the following stockholders, officers and directors (Kist Exs. 1, 2 and 3):

| Shareholder | Percentage of Ownership | Office |
|---|---|---|
| Hugh B. MacCauley [10] | 12.5% | Chairman |
| W. Carlos O. Fox | 8.33% | President, Director |
| Harold R. Austin | 8.33% | Director |
| Edward G. Butler | 8.33% | Secretary/Treasurer, Director |
| Felice Cooper [10] | 4.17% | Vice President-Programming, Director |
| Olin F. Koch | 8.33% | Vice President-Administration, Director |
| Clinton L. Cogbill | 8.33% | Director |
| Scott Reynolds | — | Assistant Secretary |
| Willis H. Boyd | 8.33% | Director |
| Helmut J. Dueck | 8.33% | Director |
| Wayne Wauchtel | 8.33% | Director |
| Donald C. Hubbs | 8.33% | Director |
| | 91.67% [11] | |

[10] Mr. McCauley and Ms. Cooper are husband and wife (Kist Ex. 1).

[11] Information concerning the additional 8.33% stock is not part of the record evidence in this hearing.

51. No stockholder of Kist has any interest in any AM, FM or TV broadcast station or cable television system (Kist Ex. 4).

52. Five stockholders of Kist will be employed full-time at the station as follows: W. Carlos O. Fox as General Manager, Felice Cooper as Vice President-Programming, Edward G. Butler as Chief Financial Officer, Harold R. Austin as Assistant Director of Sales and Olin Koch as Vice President-Administration (Kist Ex. 5, p. 1). Two stockholders of Kist will be employed part-time (at least 20 hours per week) at the station as follows: Hugh B. MacCauley as Sales Account Executive and Clinton L. Cogbill as Sales Account Executive (Kist Ex. 5, p. 3).

53. *W. Carlos O. Fox* will be the General Manager of the proposed station. Mr. Fox will perform the duties customarily performed by the general manager of a station, overseeing and supervising the entire operation. The various department heads (sales, programming, engineering, administration and finance) will report to him (Kist Ex. 5, p. 1; Tr. 711). Mr. Fox lives at the present time at Homosassa Springs, Florida. He will move to Riverside in the event the Kist application is granted and work full-time at the station (Kist Ex. 1, p. 1).

54. Mr. Fox is semi-retired (Tr. 708), but works as a management consultant at the present time (Kist Ex. 1, p. 1). Mr. Fox has experience in the communications common carrier field, but no broadcast experience apart from his work in the early 1950's involving constructing Voice of America stations (Kist Ex. 1, p. 1-3). His association with these broadcast stations ended at the time they went on the air (Tr. 710). Mr. Fox will terminate his management consultant role should the Kist application be granted (Tr. 707).

55. Mr. Fox claims to be an Hispanic (Kist 1, p. 1). However, Mr. Fox was born in Baltimore, Maryland

(Tr. 703-705, 753) and has no immediate relatives living outside this country (Tr. 704-705). Of his four grandparents, only his paternal grandfather is of Hispanic heritage, having been born in Cuba (Tr. 703-704). Mr. Fox is not a fluent speaker of Spanish; Spanish was only spoken from time to time in his home by his father (Tr. 705). Mr. Fox also apparently has no connection with the local Riverside Hispanic community.

56. *Felice Cooper* is proposed to be Vice President-Programming of the station. She will be responsible for the program department, including the selection of programming and personnel for that department. She will chair a program committee which will meet weekly for the purpose of discussing programming plans (Kist Ex. 5, p. 1), and programming decisions will be made in consultation with the members of that Committee (Tr. 949).

57. Ms. Cooper has been a resident of Riverside for five years (Kist Ex. 1, p. 10). With the exception of a few hours each month spent on certain business-related activities (Tr. 952), Ms. Cooper has no regular business or employment position (Tr. 952). Ms. Cooper intends to work a minimum of 40 hours per week at the station (Kist Ex. 1, p. 11).

58. Ms. Cooper was born in England. She was a part owner, director, and manager of the Whitehall Theater in London from 1951 to 1964; she became sole owner of the theater in 1964. From that time until she sold the theater in 1970, she was the managing director, supervising all phases of its operation (Kist Ex. 1, pp. 10-11). Ms. Cooper has no broadcast experience (Tr. 947). Ms. Cooper claims civic involvement as a member of the Red Cross, a member of the Humane Society,[12] and a mem-

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[12] Her membership in the Humane Society is the result of a monetary contribution made to the organization (Tr. 950).

ber of the Officers Wives Club at Norton and March Air Force Bases. However, she does not devote any appreciable time to these activities (Tr. 947); nor does she describe herself as active in civic affairs. She describes her activities as purely social in nature (Tr. 949-51).

59. *Edward G. Butler* is proposed to be Chief Financial Officer at the station (Kist Ex. 5, p. 1, 2). In that role, he will supervise the people engaged in the financial activities at the station, prepare its budget and financial plan, and do the coordination necessary to see that financial plans are followed by other departments of the station (Tr. 1091).

60. Mr. Butler currently resides in Riverside, and has resided in the Riverside area for fifteen years (Kist Ex. 1, p. 7). He is currently the Assistant Executive Director of Development and Community Relations for Riverside Community Hospital and Executive Director of Riverside Community Hospital Foundation (Kist Ex. 1, p. 7), but he will terminate these positions and work a minimum of 40 hours per week at the station if the KIST application is granted (Tr. 1100-01). From 1966 through 1968 and from 1973 through 1974 Mr. Butler served as a member of the board of directors for United Way. From 1972 to present he has been Secretary/Treasurer of the Monday Morning Group of Riverside. In 1974 and 1975 he was a member of the board of directors of the Rotary Club. From 1966 to 1968 he was a member of the board of directors of the Riverside Chamber of Commerce. From 1970 to 1972 he was President and, from 1972 to 1974, a member of the board of directors of the Easter Seals/Crippled Children's Society. He has also been a member of the Citizens University Committee, University of California, Riverside (Kist Ex. 1, p. 8).

61. *Harold R. Austin* is proposed to be the Assistant Director of Sales of the station (Kist 5, p. 1, Tr. 771).

His duties there will be to head the sales department (Kist Ex. 5, p. 2), including the supervision of salesmen (Tr. 777).

62. Mr. Austin currently resides in Riverside and has resided in the Riverside area for the past 9 years (Kist Ex. 1, p. 4). Mr. Austin is currently engaged in the business of buying and selling investment securities (Kist Ex. 1, p. 4), but will terminate his present position and work at the station full-time should the Kist application be granted (Kist Ex. 1, p. 5, Tr. 774). Mr. Austin is Vice President of the Riverside chapter of the Air Force Association. He is Vice Chairman of the Military Affairs Committee of the Riverside Chamber of Commerce. He is a member of the Order of Daedalians (an association of military pilots) and the Retired Officers Association (Kist Ex. 1, p. 5).

63. *Olin F. Koch* is proposed to be the Vice President-Administration of the station (Kist Ex. 5, p. 2). Mr. Koch will have overall responsibility for the administration of the station including the bookkeeping aspects and cooridnation with the comptroller and the secretarial services (Tr. 869). He envisions his duties will include assisting the general manager in program planning, acquisition and development; responding to viewer complaints and concerns; serve as spokesman for the station in union matters; maintain communications with the community at large; and represent the station through participation in organizations such as the NAB, TVB and NATPE (Tr. 864-65).

64. Mr. Koch resides in Redlands, California, which is located approximately 10 miles from Riverside (Tr. 842-43). Mr. Koch is presently project manager of a firm engaged in the construction and managing of commercial and office properties (Kist Ex. 1, p. 13). He has held various administrative positions in the Air Force (Tr. 873), but he has no broadcast experience (Tr. 846,

874). Mr. Koch is a member of the San Bernardino chapters of the Air Force Association and the Retired Officers Association (Kist Ex. 1, p. 14, Tr. 851). He is also a member of the Officers Club at Norton Air Force Base and the Norton Air Force Base Chapel (Kist Ex. 1, p. 14). In 1972 to 1974 he was a member of the San Bernardino chapter of the Society of Logistic Engineers (Kist Ex. 1, p. 14, Tr. 870-71, 851).

65. *Hugh B. MacCauley* is proposed to be a part-time Sales Account Executive at the station, working at least 20 hours a week (Kist Ex. 5, p. 3). Mr. MacCauley's duties will be to solicit advertising from the community (Tr. 913). He will be supervised by the Assistant Director of Sales, Harold Austin (Tr. 807, 908), and will also be subordinate to the station manager in his role as a salesman (Tr. 908-910). Mr. MacCauley will not supervise other employees (Tr. 907). Mr. MacCauley will not give up his present stockbrokering business, at which he works approximately 20 hours per week (Tr. 934-36).

66. Mr. MacCauley[13] was from 1977 to 1980 a member of the board of directors of the Rotary Club in Riverside, and he remains a member of that organization. He also remains a member of the Daedalian Society and the Air Force Association, in which he served as Vice President of the San Bernardino chapter from 1974 to 1976 (Kist Ex. 2, p. 2). However, Mr. MacCauley himself characterized these as "social organizations" and has no civic activities to which he devotes time (Tr. 926).

67. *Clinton L. Cogbill* is also proposed to work part-time (20 hours) at the station as a Sales Account Executive (Kist Ex. 5, p. 3). Mr. Cogbill perceives his role to be that of selling advertisements to the various merchants in the Riverside area (Tr. 828). He will be supervised

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[13] As noted *supra,* Mr. MacCauley is the husband of Ms. Cooper and they reside in Riverside.

in his endeavors by Mr. Austin, Assistant Director of Sales (Tr. 807), and will not have any supervisory role over other employees (Tr. 828). He will have no programming decision-making responsibility (Tr. 828-29), and he will not participate in decisions relating to personnel (Tr. 829).

68. Mr. Cogbill has served as President of the Redlands Boys Club and on the board of directors of the Redlands Kiwanis. He was a director of the Redlands Day Nursery, and has been a member of the board of directors of the Valley Prep School in Redlands, of which he was Vice President in 1978 (Kist Ex. 2, p. 4, 5).[14]

*Ettlinger Broadcasting Corporation*

69. EBC is a California corporation. Although no stock has been issued by the Corporation, 5,500 shares have been subscribed to by the following persons (EBC Ex. 1):

| Principal | Shares/Percent | Office |
|---|---|---|
| John A. Ettlinger | 3,300/60% | President |
| Kathleen C. Keep | 1,100/20% | Vice President |
| Charles Theodore | 825/15% | Vice President |
| Greta Ettlinger | 275/5% | Secretary/Treasurer |

70. EBC itslef holds no other broadcast licenses or authorizations. The only stock subscriber with other broadcast or media related interests is John A. Ettlinger. Mr. Ettlinger is a 23.18% shareholder in Quality Broadcasting Corp., licensee of station KUDO-FM, Las Vegas, Nevada. Mr. Ettlinger holds debentures in Quality Broadcasting Corp., which, if converted to stock, would increase his ownership interest to about 47% (EBC Ex. 2, p. 2, Tr. 978). Mr. Ettlinger is also a 6.37% stockholder in Forrest Broadcasting Co., which owns all of

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[14] Mr. Cogbill lives in Mentone, California, 15 miles from Riverside. Redlands is 10 miles from Riverside (Tr. 826-27).

the stock of the licensees of stations KDON/KDON-FM, Salinas, California, and stations KBBQ/KBBY(FM), Ventura, California (EBC Ex. 2, p. 2).

71. *Kathleep Keep* is proposed to be the station's full-time General Manager (EBC Ex. 1. As General Manager of the proposed station, Ms. Keep will have responsibility for the day-to-day operations of the station, including the supervision of all station personnel. Ms. Keep will also perform the functions of station manager, news and public affairs director and program director. In addition, Ms. Keep will produce a nightly 10 minutes news/public affairs program on current events in the "Inland Empire" area, of which Riverside is a part. Ms. Keep will also host a weekly talk show on important issues affecting the community of Riverside and the "Inland Empire" region (EBC Ex. 3, 4).

72. Ms. Keep is a resident of Joshua Tree, California, which is approximately 55 miles from Riverside (Tr. 1190). She expects to maintain that residence while working full-time at the station in Riverside (Tr. 1190). Ms. Keep will also obtain an apartment in Riverside (Tr. 1248).

73. Ms. Keep grew up and was educated within a 25 mile radius of Riverside. She is a graduate of Fontana High School and graduated with honors from Chaffey Junior College in Ontario, California in 1960 (EBC Ex. 3, p. 1). Ms. Keep is currently employed as a production manager at EMIA/Liberty Records, Los Angeles, California. Should the EBC application be granted, she will resign that position (EBC Ex. 3, p. 1-2). Ms. Keep is not now associated with any civic organization in the Riverside area (Tr. 1203).

74. John Ettlinger is proposed to spend one day per week at the station in a supervisory capacity and a minimum of 16 hours per week to program acquisition for the station (EBC Ex. 1). Mr. Ettlinger will hold no title at the station but will be responsible for supervising

the construction of the station and supervising the General Manager once the station is constructed (EBC Ex. 2, p. 1; Tr. 987-89, 1014-15, 1079, 1082). In addition, Mr. Ettlinger will be in charge of program acquisition (EBC Ex. 2, p. 1).

75. Mr. Ettlinger is a resident of Beverly Hills, California, which is located approximately 52 miles from Riverside (Tr. 984). He intends to maintain that residence if the Ettlinger application is granted (EBC Ex. 2, p. 1). Mr. Ettlinger is currently President and 100% owner of Medallion TV Enterprises, Inc.[15] and of Jett Advertising Agency[16] both located in West Hollywood, California. He devotes up to 16 to 24 hours a week working at Medallion (Tr. 973). Jett requires his attention for about two hours a month, except when it is involved in producing commercials. This occurs infrequently but demands an additional unspecified amount of his time. He is also currently self-employed as a producer and director of motion picture films and television programs. This activity at times involves travel outside the Los Angeles area and at times requires his round the clock attention (Tr. 972). From 1967 to 1973, Mr. Ettlinger was Executive Vice President of station KSHO-TV, Las Vegas, Nevada. He was in charge of program acquisition and the construction of a new facility for that station. From 1977 to March 1981, Mr. Ettlinger was President, Treasurer and director of Quality Broadcasting Corp., licensee of station KUDO-FM, Las Vegas, Nevada. In that capacity Mr. Ettlinger had primary re-

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[15] Medallion purchases and sells programming throughout the world including to independents in the Los Angeles area. Medallion programming will also be sold to cable systems via satellites (Tr. 973-74). Medallion will initially provide 55% of the station's programming (Tr. 1006). The remainder will be obtained through barter arrangements (EBC Ex. 4, pp. 1-2; Tr. 1010).

[16] Jett is involved in the production and placement of radio and TV advertising campaigns (EBC Ex. 2, p. 2).

sponsibility for the construction of station KUDO-FM and its operation after it began broadcasting (EBC Ex. 2, pp. 1-2).

76. Mr. Ettlinger is a long-time member of the board of directors and past President of Viking Charities Funds of Beverly Hills, which is engaged in the assistance of underprivileged and disabled children (EBC Ex. 2, pp. 2-3; Tr. 985). Mr. Ettlinger is also a member of the Horseman's Protective and Benevolent Association, California Chapter (Tr. 985), although he stated on the witness stand that his activities related to horse farming are mostly for his enjoyment (Tr. 985-86, EBC Ex. 2, p. 3). Mr. Ettlinger is not involved in any civic activities in the Riverside area (EBC Ex. 2).

*Sunland Communications Company*

77. Sunland is a Pennsylvania partnership registered to engage in activities of all kinds in the telecommunications industry. The partners of Sunland are as follows (Sunland Ex. 1):

| Name | Partnership Interest [17] |
|---|---|
| Jack M. Hodin | 55% |
| Andres Luis Soto | 35%[18] |

The principals own no media interests (Sunland Ex. 5).

[17] At the B cut-off date Sunland had a third partner, Mr. George Strimel, who had a 10% partnership interest. Mr. Strimel dropped out of the partnership subsequent to the B cut-off date and his interest was assumed by Jack Hodin. Mr. Hodin's actual partnership interest is thus 65%; however, for comparative purposes Mr. Hodin is being viewed as a 55% partner (Tr. 1168).

[18] Under the Sunland Partnership Agreement, Mr. Hodin is required to contribute his share of the capital and also contribute on a loan basis the capital contributions required from Mr. Soto until such time as Sunland receives the license for the Riverside station. If Sunland is unsuccessful, Mr. Soto is not obligated to either the partnership or Mr. Hodin for funds advanced or contributed by him. Assuming Sunland gets the grant, Mr. Soto is

78. *Jack Hodin*, 55% partner of Sunland, will have the title of Managing Partner. Mr. Hodin will work full-time at the station at the outset (estimated to be the first six months to one year of station operations) and on a permanent basis for a minimum of twenty hours per week. Mr. Hodin will direct the general administrative and financial aspects of the station. He will work closely and personally with Sunland's bankers and other sources of funds. He will have personal responsibility for the preparation of the station budget, and will oversee the station's accountants and other financial officers. In addition, Mr. Hodin will develop and maintain contacts with and participation in the community of Riverside and will be involved in the station's programming and sales of advertising in the community (Sunland Ex. 4, p. 1; Tr. 1156-57).[19]

79. Mr. Hodin is a resident of Scranton, Pennsylvania, where he has lived throughout most of his life (Sunland Ex. 2, p. 1). Mr. Hodin intends to move his residence to the Riverside area should Sunland be granted its application (Sunland Ex. 4, p. 1), although

obligated to pay back any advances made on his behalf from future station profits. In addition, Mr. Soto is obligated under the Agreement to contribute to the construction and operation of the station in proportion to his 35% partnership interest (Family Ex. 9, pp. 2-3).

[19] Section 7 of the Partnership Agreement provides that the partners shall be entitled to vote on partnership business in accordance with their respective share of the partnership (Family Ex. 9, p. 4). Mr. Hodin's otherwise controlling partnership interest is limited so that a number of actions to be taken by the partnership can only be done with Mr. Soto's consent. Thus, for example, Mr. Hodin cannot sell, assign, mortgage, or grant a security interest in his Sunland partnership interest without the written consent of Mr. Soto (Family Ex. 9, p. 5). In addition, all withdrawals from the partnership bank accounts must be signed by Mr. Soto as well as Mr. Hodin. Also, dissolution of the partnership and amendment or modification of the partnership agreement requires the consent of both partners (Family Ex. 9, pp. 5-6).

possibly not in the city of Riverside (Tr. 1185). Mr. Hodin served as a board member and officer of the license of non-commercial educational stations WVIA-FM/TV and, in this role, he participated in the overall policies and affairs of the licensee, and, in particular, its financial affairs (Sunland Ex. 2, p. 2). More recently, Mr. Hodin served on the Executive Committee of the board and as Treasurer of the licensee (Sunland Ex. 2, p. 2).

80. *Andres Soto* will be General Manager of the proposed station. Mr. Soto will devote full-time to this position, working an average of at least forty hours per week at the station on a permanent basis. Mr. Soto's duties will be those typically associated with the general manager of a television station. He will directly supervise other management, technical, professional and sales employees. He will supervise all programming activities. He will be involved in the production of certain programs and the sale of advertising while he carries out day-to-day operational responsibilities at the station. Additionally, Mr. Soto will continue to maintain his civic activities in the Riverside area (Sunland Ex. 4 at 2).

81. Mr. Soto, who is Hispanic, was born in Mexicali, Mexico (Tr. 1272). He has lived in the Riverside area for the past 28 years and attended grade school and high school in Riverside. In 1975, he received an Associate of Arts degree from Riverside City College and he continued his studies at the University of California, Riverside, majoring in history and Chicano studies. He was active in student affairs at both colleges. From February 1980 to the present, Mr. Soto has been employed as the community relations specialist for the County of Riverside, Office of Community Development. He would terminate this employment if the Sunland application is granted (Sunland Ex. 3, p. 3).

82. Mr. Soto is a member and past chairman of the City of Riverside Parks and Recreation Commission, past president and current secretary of the Greater Riverside

Hispanic Chamber of Commerce, and a member of the City of Riverside Local Planning Committee. He has served as chairman of the City of Riverside Community Development Advisory Committee. Mr. Soto is a member and past chairman of the Veterans Employment Committee of the Greater Riverside area, a member of American Legion Post #289, and a member, past chairman, vice chairman and secretary of the American GI Forum, Riverside Chapter. He has been a member of the Board of Directors of the Easter Seals Society and the American Red Cross. He belongs to the Riverside Brown Baggers and the Riverside Jaycees. Mr. Soto is currently vice president of the State of California Mexican-American Chamber of Commerce Board of Directors and chairman of the Arlanza-la Sierra Citizens Advisory Committee. He has also served as president of the Quinto Barrio Soft Ball League. He is a member of the Mexican American Political Association (MAPA), the California Republican Hispanic Council and the Riverside County Republican Party Central Committee. In 1980 he was the recipient of the Jaycees Distinguished Service Award (Sunland Ex. 3, p. 4). Mr. Soto intends to continue to participate in civic activities if the Sunland application is granted and estimates that these activities would take five to six hours a week (Sunland Ex. 3, p. 5). Mr. Soto currently spends ten to eleven hours a week on community activities (Tr. 1265).

*Bethel Broadcasting, Inc.*

83. Bethel is a non-stock California Corporation. Its officers and Directors are Ronald B. Halvorson (Director, Chairman), Carl E. Vaughn (Director, President/Treasurer) and Ronald R. Heumann (Director, Vice President/Secretary) (Bethel Ex. 1).

84. Neither Bethel nor any of its officers or directors have any interest in any broadcast station or other medium of mass communications. BCC publishes bulletins

and newsletters solely for its members and persons visiting or inquiring about it (Bethel Ex. 3).

85. Bethel's rulemaking and application activities have been financed primarily by Bethel Christian Center (BCC) with some additional contributions coming directly from the members of BCC's congregation (BCC's congregation totals approximately 400 voting members (Tr. 2046)). These individual contributions have been made through BCC to Bethel. These funds for Bethel remain in BCC's bank account and have been paid directly out of this account (Tr. 1360). There have been no documents executed between BCC and Bethel regarding BCC's payments of Bethel's expenses, although Bethel's President, Mr. Vaughn, testified that the money is being treated as a gift (Tr. 1424). As well as supplying funds to Bethel, BCC's office and building will be used for Bethel's studio (Tr. 2041).

86. Bethel's Board of Directors is self-perpetuating and the corporation's officers are elected by the Board. The Bylaws of Bethel provide that the pastor of BCC will be the Chairman of the Board of Bethel (Bethel Ex. 1). Mr. Halvorson, Bethel's Chairman of the Board, is BCC's current pastor (Tr. 2024). In addition, Mr. Vaughn is a member of BCC and is employed as the administrator of BCC. In that capacity he is responsible for the day-to-day administration of that institution (Bethel Ex. 9, p. 2; Tr. 1350-51).

87. If Bethel's application is granted, Mr. Vaughn will be the full-time General Manager of the proposed station (Tr. 1366). His duties at the proposed television station will encompass the general supervision of all station operations, including programming, personnel, community relations and finances. It is anticipated that Mr. Vaughn will have full and sole authority to make all day-to-day decisions affecting station operations and programming, subject only to the policy directives of Bethel's board of

directors, of which he is a member (Bethel Ex. 5; Tr. 1368-9).

88. Mr. Vaughn moved to Riverside, California, in 1971. He currently resides in Sunnymead, California. In addition to his employment at BCC, Mr. Vaughn is an active member of the Church Business Administrators Advisory Council of California Paptish College, Riverside, California; the Riverside Area Board of Realtors; and the Riverside Chapter of the Full Gospel Businessmens Fellowship, International, of which he was Vice President in 1974-75 (Bethel Ex. 9, pp. 2, 3). Mr. Vaughn intends to resign from his present position with BCC. He will maintain his present civic activities and will also continue as a real estate licensee in the Riverside area (Tr. 1367-68).

*Channel 62, A Limited Partnership*

89. Channel 62 is a California limited partnership composed of two general partners and eleven limited partners (Channel 62 Ex. 16). Under the terms of the limited partnership agreement (Channel 62 Ex. 16), the general partners have sole responsibility for the management and control of the partnership business. The limited partners are essentially passive investors in the project.

90. One general partner is Channel 62, Incorporated, a California business corporation the stock of which is owned 100% by the Greater Riverside Chambers of Commerce (Chambers), a non-profit corporation (Tr. 1905). Under the limited partnership agreement, Channel 62, Incorporated is obligated to contribute $100 towards the capital of the limited partnership. For this contribution, Channel 62, Incorporated is entitled to share in 1% of the profits of the limited partnership until such time as the eleven limited partners have been fully repaid their capital contributions; at that time Channel 62, Incorporated will be entitled to 25% of the profits of Channel

62. Channel 62, Incorporated is responsible for 1% of the net losses of the limited partnership.

91. The overall policy of Channel 62, Incorporated is directed by its five-member board of directors, who are elected by the board of directors of the Chambers (Tr. 1890-91). The number of directors of the Chambers varies from time to time, but typically approximates forty-two (Tr. 1447, 1451). The present board of directors of Channel 62, Incorporated are (Channel 62 Ex. 4):

| Principal | Office |
|---|---|
| Arthur Pick | Director/Secretary |
| Herman Reed | Director/President |
| Lucille Gilbreath | Director/First Vice President |
| Clare Taber | Director/Second Vice President |
| David Doig | Director/Treasurer |

92. The second general partner, according to the limited partnership agreement, is Art Pick (Channel 62 Ex. 16), who is Executive Vice President of the Chambers (Channel 62 Ex. 1) and also a member of the board of directors of Channel 62, Incorporated (Channel 62 Ex. 4). According to the limited partnership agreement, Schedule "A", Mr. Pick's interest in the limited partnership is 0%, and he has made no capital contribution to the partnership. Mr. Pick will not share in the profits of the partnership; nor will he be responsible for its net losses.

93. The limited partners are responsible for 99% of the net losses of the limited partnership up to the full amount of their capital contributions. They are entitled to 99% of the net profits of the partnership until their capital contributions have been repaid in full; thereafter they are entitled to 75% of the net profits of the partnership in proportion to their contributions (Channel 62 Ex. 16). The limited partners are as follows (Channel 62 Ex. 16, Schedule "A"):

| Principal | Contribution | Percentage Interest (Losses) |
|---|---|---|
| John Gilbreath | $7,500 | 4.95% |
| Robert Hocker | $15,000 | 9.9% |
| Lucille Gilbreath | $15,000 | 9.9% |
| Russell Walling | $15,000 | 9.9% |
| Clare Taber | $15,000 | 9.9% |
| Ronald Pettis | $15,000 | 9.9% |
| Albert Kishaba | $7,500 | 4.95% |
| Norton Younglove | $15,000 | 9.9% |
| Jack Chase | $15,000 | 9.9% |
| Arthur Lopez | $15,000 | 9.9% |
| Betty Cox Johnson | $15,000 | 9.9% |
| | | 99.0% |

94. Channel 62, the applicant, has no other interests in any medium of mass communications. Neither the general partners, Channel 62, Incorporated and Mr. Pick, nor any of the limited partners have any interests in other media. However, certain past and present directors of the Chambers do have media interests. Les Richter, Howard Fisher and Bart Singletary are owners, officers and directors of Inland Empire Broadcasters, licensee of radio station KPRO(AM), Riverside, California, and KWTC/KZNS(FM), Barstow, California. Mr. Tomas Rivera is a member of the board of directors of the Times Mirror Company, owner of newspapers and television stations. The television stations are WSTM, Syracuse, New York; KTVI, St. Louis, Missouri; KDFW, Dallas, Texas; KTBC, Austin, Texas; WETM, Elmira, New York, WHTM, Harrisburg, Pennsylvania and WVTM, Birmingham, Alabama (Channel 62 Ex. 2).

95. According to Channel 62 Exhibit 2, none of the above directors of the Chambers will participate in any way or in any way act on any matter involving the pending application for Channel 62, nor will they participate if a license is ultimately granted to Channel 62. However, there are no specific insulating procedures in

the Chambers' bylaws (Tr. 1976). Furthermore, it appears that Mr. Richter, Mr. Fisher and Mr. Singletary were involved in activities resulting in the filing of the Channel 62 application (Tr. 1912-15). Mr. Fisher was an early promoter of the project (Tr. 1286-87) while he was serving as President of the Chambers (Tr. 1317) and as Chairman of the Chambers' executive committee (Tr. 1911). Mr. Fisher remains on the executive committee (Tr. 1918). Mr. Richter was consistently involved in organizing Channel 62, Incorporated and served as a member of its board of directors and as a Second Vice President (Channel 62 Ex. 31, Ex. 12 at 2, Ex. 13, p. 4, Tr. 1883). Mr. Richter resigned from the Channel 62, Incorporated board on the day the Channel 62 application was signed (Tr. 1884). Mr. Singletary is now the President of the Greater Riverside Chambers of Commerce (Tr. 1922).

96. Channel 62's application stated that Mr. Pick would "devote at least 25% of his time as the General Manager of the proposed station." (Channel 62, Ex. 17). Mr. Pick stated that by this 25% figure, he intends to work in excess of 20 hours per week at the station.[20] (Tr. 1850-51). Presently, Mr. Pick works a maximum of 70 hours a week (Tr. 1848-51). When asked to explain this apparent discrepancy, Mr. Pick stated that he has the option of working more hours in the week, up to 100 (Tr. 1850-51).[21] Mr. Pick stated that it was always his

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[20] Channel 62 also proposed Mrs. Johnson as an integrated principal. However, both because of her role as a limited partner and because of her testimony that she would not have a decision-making role at the station, the Presiding Judge struck her testimony to the extent it proposed integration (Tr. 1330).

[21] Mr. Pick's calculation of his time based on Channel 62's application is different from the way Channel 62's other proposed integrated principal, Mrs. Johnson, calculated her time based on the same Exhibit. Thus, Mrs. Johnson understood the portion of the application indicating that she would work at the proposed station "on a 75% basis" to mean 75% of her normal work week (Tr. 1308-09), four to six hours a week (Tr. 1297).

intention to work at the station 20 to 25 hours per week (Tr. 1959). Nevertheless, Mr. Pick signed sworn answers to the Interrogatories of both EBC and Family, stating that he would devote approximately 10 hours per week in the operation of the station (Tr. 1962-64). Mr. Pick's only explanation for his signed and sworn answers to Interrogatories was, "I think it missed something in translation when we were communicating through secretaries and administrative assistants" (Tr. 1996).

97. Mr. Pick moved to Riverside in 1955 (Channel 62, Ex. 1, p. 1). He has been involved in a variety of community activities in Riverside. His more recent activities have included his membership in the late 1960's and early 1970's on the Riverside City Council, his membership and later Chairmanship of the City of Riverside Cultural Heritage Board, his membership on the Advisory Board for the Riverside Junior League and the League of Women Voters and his Vice Presidency of "The Friends of the Mission Inn." In 1981, Mr. Pick was elected a member of the Board of Directors of the Riverside United Way and is a member of the Board of the U.C.R. Alumni Association, positions which he still holds. Finally, Mr. Pick was a founder and a member of the Board of Directors and a member of the Executive Committee and Treasurer of Citizens Goals for the Greater Riverside area and was founding member of the Executive Committee and Treasurer of the Mocking Bird Park Advisory Committee (Channel 62. 1, pp. 4-6).

*Riverside Family Television, Inc.*

98. Family is a Tennessee Corporation which was organized in 1981. Family has three principals: Cheryal A. Kearney is its President, a Director and, as of the B cut-off date in this proceeding, 80% stockholder;[22] Jack

[22] Subsequently, Ms. Kearney and Mr. Dalton shifted their stock interests to 95% for Ms. Kearney and 5% for Mr. Dalton (Family Ex. 1, p. 1).

Dalton is its Vice President/Treasurer, a Director and, as of the B cut-off date 20% stockholder; and Erma L. Freeman is its Secretary, having no stock interest in Family (Family Ex. 1, p. 1).[23]

99. The principals of Riverside Family have no interests in any broadcast station or in any other media or mass communications entity[24] (Family Ex. 1, p. 2). Mr. Dalton had a very brief interest in a construction permit for KSPR(TV), Channel 33, Springfield, Missouri (BPCT-800714KJ). After the Riverside Family application was filed and following the B cut-off date, Mr. Dalton became a 33% limited partner in Springfield Television Associates, Ltd., the proposed assignee of the construction permit of KSPR(TV), Channel 33, Springfield, Missouri, from Springfield Family Television, Inc. (BAPCT-820414FR). Mr. Dalton agreed to sell his interest to another limited partner sometime in late June or early July 1982 (Tr. 2075, 2132). The actual sale was delayed, however, in order to give the purchaser time to assemble his funds and for the papers to be drawn up and signed (Tr. 2075). Prior to the consummation of the sale, on August 4, 1982, the Commission, under delegated authority, granted its consent to the assignment to Springfield Television Associates, Ltd. Mr. Dalton subsequently sold his interests in Springfield Television Associates, Ltd., pursuant to the aforementioned agreement for an amount equal to his contribution to the partnership to the other limited partner on August 17, 1982

[23] Ms. Freeman was Dalton's pesronal secretary in Nashville, Tennessee and had acted as corporate secretary in other broadcast applications involving Dalton (Tr. 2103). Mr. Dalton owns a construction company and other businesses in Nashville, Tennessee (Tr. 2173-74).

[24] Principals of Family are also involved in pending broadcast applications, but such applications have no comparative significance. *Hi-Point Broadcasting Co.*, 14 FCC 2d 365, 366 (1968).

(Family Ex. 1, p. 2).[24a] Springfield, Missouri is approximately 1,450 miles from Riverside, California. It has four other television stations as well as a construction permit outstanding. There are eleven other radio stations in the market (Family Ex. 7).

100. Ms. Freeman was the Secretary, Director and the holder of 20 shares (2%) of High Country Broadcasting, Inc., holder of a construction permit for a new television station, Channel 27, at Reno, Nevada (BPCT-810302KF) at the time the application was filed. She has since resigned her offices and sold her interests in the station (Family Ex. 7). Reno, Nevada is approximately 400 miles from Riverside, California. It has four other television stations as well as a construction permit outstanding (Family Ex. 7).

101. Ms. Kearney, a Black female, is proposed as the full-time General Manager of the station. As General Manager, she will supervise the construction and operation of the station. She will be responsible for making decisions regarding employment, programming and the the station's operating budget (Family Ex. 2, p. 1).

102. Ms. Kearney is a life-long resident of Los Angeles, where she currently resides (Family Ex. 2, p. 1, 4). Her present residence is approximately one hour and 15 minutes commuting distance from downtown Riverside (Tr. 2362). Ms. Kearney has not at this time made a decision to commit herself to moving closer to Riverside (Family Ex. 2, p. 4; Tr. 2407). Ms. Kearney has a BA degree in interior design from Woodbury College in Los Angeles. She has also taken graduate courses at the Musee Des Arts Decoratifs in Paris in association with the Parsons School of Design in New York City (Family Ex. 2, p. 1). For the last 13 years, she has been a free-

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[24a] The Commission's grant of the assignment application and Mr. Dalton's subsequent divestiture were reported in a single timely filed amendment (Official notice taken, Family amendment, filed August 27, 1982).

lance set decorator in the movie and television film industry. She is responsible for putting together the set design for filming. In this role, she works for production designers and art directors in the production of movie and television films. Ms. Kearney's duties include the hiring, firing, and supervision of the crew which constructs the sets used for filming (Family Ex. 2, p. 2).

103. Ms. Kearney has been a member of the NAACP for approximately 15 years. She is now a member of the Los Angeles branch, having switched her membership from the Beverly Hills/Hollywood branch. From time to time she participates in fundraising and voter registraition functions and, in addition, has served on the executive board of the Hollywood/Beverly Hills branch. Ms. Kearney has been a member of the Urban League in Los Angeles for approximately three years. She has been a member of the Brockman Gallery in Los Angeles for approximately 13 or 14 years. As a member, she attends art fairs and art shows. She has also been a member since June 1982 of the California Museum of Afro-American History and Culture in Los Angeles. She attends gallery openings and shows. Finally, Ms. Kearney has attended and in early 1982 became a member of the Cornerstone Institutional Baptist Church in Los Angeles (Family Ex. 2, p. 3).

104. During the course of the hearing, certain questions were raised concerning the true and actual ownership of Family. These questions arose from the fact that Mr. Dalton, a 5% shareholder, had advanced all the funds for the venture (Tr. 2078-80), while Ms. Kearney, the 95% shareholder, had not paid for her stock or made any other financial contribution to the applicant (Tr. 2364). The following facts were elicited: Mr. Dalton has known Ms. Kearney only about 3 years. He came to know Ms. Kearney after Mr. Dalton's wife studied for a time with Ms. Kearney in Paris (Tr. 2099). Subsequent to that time, Ms. Kearney and Mr. Dalton's wife con-

tacted each other from time to time, and Ms. Kearney visited the Daltons in Tennessee for one week during 1980 (Tr. 2163). During that visit Ms. Kearney told Mr. Dalton that she would like to get involved in some sort of business and the two discussed that possibility but did not get into specifies. The Riverside television project was not discussed (Tr. 2163-64). Subsequent to that visit in 1980, Mr. Dalton had no face-to-face meeting with Ms. Kearney until the hearing in this proceeding (Tr. 2164, 2167). Mr. Dalton has had no other business relationship with Ms. Kearney (Tr. 2100). Mr. Dalton has not seen her financial statements (Tr. 2100).

105. Mr. Dalton stated that the purpose of the stock structure, in which he received only 5% of the stock but was advancing all of the money, was to maximize Family's chance of winning at a comparative hearing (Tr. 2255-56, 2269, 2272). Mr. Dalton stated that the "sole reason" why he was willing to take only 5% was so that Family would gain under the integration criterion (Tr. 2274). Although Mr. Dalton was aware that Ms. Kearney's income was $60,000 a year (Tr. 2267-68), he "thought it would be fair" for Ms. Kearney to receive 95% of the stock of the company without paying for the stock or otherwise contributing to the expenses of the application (Tr. 2268-69). Mr. Dalton stated that he and Ms. Kearney have no agreement or understanding of any kind nor have they ever had any discussions regarding his purchase of Ms. Kearney's stock (Tr. 2269-70, 2273-74, 2275, 2374, 2409).

106. With respect to the issuance of stock, $1,000 has been paid in for the 1,000 shares of issued stock (Tr. 2078). Mr. Dalton paid the entire $1,000, and expects no payment for those shares by Ms. Kearney (Tr. 2134). Ms. Kearney's contribution to the company or the application process has only been her time spent on application matters (Tr. 2136) and certain out-of-pocket expenses incurred by her for this purpose (Tr. 2134-35).

One day prior to the hearing, on September 13, 1982, Mr. Dalton prepared stock certificates for his 50 shares and Ms. Kearney's 950 shares under his own signature (Riverside Family Ex. 15; Tr. 2206-07). However, these shares were not sent to Ms. Kearney prior to the hearing (Tr. 2171, 2401); they remained in the stockbook at Mr. Dalton's office in Tennessee (Tr. 2166, 2171).

107. Mr. Dalton was the promoter of Family's participation in this proceeding. He was the one who became aware of the possibility of applying for a new station at Riverside and contacted Ms. Kearney by telephone[25] with respect to submitting an application (Tr. 2163). Mr. Dalton was familar with Sterling Communications, the consulting company which put the application together, because he had utilized their services in his applications for Daytona Beach, Florida and Richardson, Texas television stations[26] (Tr. 2181). He recommended its use in the Riverside proceeding (Tr. 2156), and he personally executed their contract (Tr. 2209-10). During the course of the proceeding, Mr. Dalton would often contact Ms. Kearney to relay information rather than having Family's attorneys contact Ms. Kearney directly (Tr. 2204-05). Mr. Dalton claimed that this was required because of Ms. Kearney's schedule and the time differences between Los Angeles and Washington, D.C., making it difficult for Family's attorneys to contact her during the day (Tr. 2204-05).

108. Ms. Kearney's activities in pursuit of the application included setting up the public file (Tr. 2136), taking pictures of the tower site (Tr. 2136), putting public notice of the filing of the application in local newspapers (Tr. 2361), calling Riverside with respect

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[25] Ms. Kearney lives in Los Angeles, California and Mr. Dalton lives in Nashville, Tennessee (Tr. 2164).

[26] The Richardson application has been dismissed (Family Ex. 1, pp. 3-4).

to EEO data (Tr. 2361) and providing information to Sterling Communications to enable it to complete the Family application (Tr. 2387-2401). Ms. Kearney had nothing to do with securing the Amvest equipment lease letter (Kist Ex. 11) although that letter was sent to her (Tr. 2360). Mr. Dalton testified that Ms. Freeman did the Riverside ascertainment work "more or less" at the direction of Ms. Kearney (Tr. 2116, 2218-19). However, it is clear that apart from meeting with Ms. Freeman and discussing the results of Ms. Freeman's work to some degree, Ms. Kearney had nothing to do with the ascertainment process (Tr. 2363, 2382-83). Ms. Freeman was paid her regular salary as secretary to Mr. Dalton during the period she was doing the ascertainment work for Family in Riverside (Tr. 2220).

109. Mr. Dalton has provided all the funds for Family. At the time of the hearing Mr. Dalton had invested \$65,000 to \$70,000 of his funds in the application process (Tr. 2079), and had paid \$1,000 for the shares of stock —including the 95% belonging to Ms. Kearney (Tr. 2078, 2134). There was no written agreement for the company to repay these advances should it be successful (Tr. 2093-94, 2079-80), but Mr. Dalton believed that there was an oral agreement to that effect (Tr. 2089-90). Ms. Kearney testified that they never discussed reimbursement of Mr. Dalton's advances (Tr. 2407). There was an explicit agreement that Ms. Kearney would not be required to pay for her stock, make loans or make other advances to Family (Tr. 2094, 2364). The advances by Mr. Dalton were believed by him to be in the nature of an interest free loan (Tr. 2090). Should Family be successful, Mr. Dalton believed that the loan would begin to accrue interest at prime plus 1% after operations at the station began with a seven year repayment from the corporation (Tr. 2091-92).

110. Mr. Dalton arranged the financing of the construction and first-three-months operation through a loan

of $500,000 to Family from a Tennessee bank in which he keeps substantial deposits (Tr. 2079-83, 2085, 2177). The Commerce Union Bank of Nashville is the same bank used by the applicants for stations in Daytona Beach, Florida and Salt Lake City, Utah with which Mr. Dalton is involved (Tr. 2145-46). The terms of the loan letter require the pledge of stock and personal guarantees of both Mr. Dalton and Ms. Kearney (Tr. 2085). Pledges of stock and personal guarantees have been submitted to the bank by both Mr. Dalton and Ms. Kearney (Tr. 2139, 2276). However, Mr. Dalton stated that he never gave the bank Ms. Kearney's financial statement (Tr. 2087) and that the bank was not interested in Ms. Kearney's financial situation (Tr. 2143). In addition, Mr. Dalton had agreed to provide a personal loan of up to $500,000 to Family as a buffer in case the bank loan proves to be inadequate to cover Family's costs (Tr. 2177). Mr. Dalton's loan would be made at the same interest and with the same repayment schedule as offered by the bank (Kist Exs. 8, 9).

111. Mr. Dalton set up Family's bank account. Family has its checking account at the Commerce Union Bank (Tr. 2078-2102). At the time the account was opened, Mr. Dalton was a signatory to the account (Tr. 2121), and he has written most of Family's checks and paid most of the bills (Tr. 2123, 2128). Ms. Kearney was not made a signatory on the account until much later (Tr. 2102), and has never written a check on the account (Tr. 2102). Mr. Dalton keeps the checkbook with him in Nashville and receives statements from the bank (Tr. 2185). The company's accountant is also in Nashville (Tr. 2078). When the account was first opened, Doctor Crants, who shares an office with Mr. Dalton and is involved with him in his television applications for Richardson and Daytona Beach (Tr. 2126), was made a signatory on the Family bank account (Tr. 2102). Mr. Crants has written checks on the account (Tr. 2120) as a "matter of convenience" (Tr. 2121). Mr. Dalton never

discussed with Ms. Kearney the fact that Mr. Crants was made a signatory to the account (Tr. 2125, 2183). Mr. Crants was deleted as a signatory on the account when Ms. Kearney was added at a latter time (Tr. 2102).

112. The shareholders and directors of Family have repeatedly ignored the company's corporate form and violated its governing documents. At the time of the hearing, there had never been an annual meeting of shareholders although the company had been in existence well over a year (Tr. 2212). There had never been an organizational meeting of directors (Tr. 2112). At the time of the hearing, the company only had two directors —Mr. Dalton and Ms. Kearney—although its bylaws (EBC Ex. 5) require three directors (Tr. 2104). At the time of the hearing, the directors had had no formal meetings and no minutes existed concerning possible informal meetings held by telephone by Mr. Dalton and Ms. Kearney (Tr. 2117, 2211). No board of directors action ever established the bank account, an action required by the bylaws (Tr. 2210). No board action was ever taken making Doctor Crants signatory to the bank account (Tr. 2183). The bylaws state that the President should issue stock in the company, but Mr. Dalton, the Treasurer and Vice President, was the one who issued the stock on September 13,-1982 (Tr. 2208). Mr. Dalton and Ms. Kearney ignored the bylaws provision prohibiting the issuance of stock for future services of Ms. Kearney (Tr. 2137-38). Neither Mr. Dalton nor Ms. Kearney was familiar with the bylaws (Tr. 2429). Mr. Dalton admitted that he had not paid too much attention to corporate formalities (Tr. 2257).

*United American Telecasters, Inc.*

113. United is a California Corporation. A total of 1,000 shares of common voting stock have been authorized and subscribed to, but none have been issued at this time. The record reflects the following subscribers to

United stock, their proposed percentage of stock ownership and their corporate office (United Ex. 2):

| Principal | Percentage | Office |
|---|---|---|
| Andrew Y. Kimm [27] | 20% | President/Director |
| Rachel Kimm [27] | 15% | Secretary/Director |
| Nicholas C. Chun | 20% | Vice President/Director |
| Goon Suk Han [28] | 25% | Director |
| Sam A. Digati | 15% | Director |
| Bong Koo Kim | 5% | —— |

114. No proposed stockholder of United has any ownership interest in any broadcast station, in any broadcast-related enterprise, or in any medium of mass communications (United Exs. 3-8).

115. Five proposed stockholders of United will be employed at the station as follows: Andrew Kimm as General Manager; Rachel Kimm as Personnel Manager; Nicholas Chun as Sales Manager; Sam Digati as Public Relations and Public Service Director; and Bong Koo Kim as Program Director. Mr. and Mrs. Kimm, Nicholas Chun and Bong Koo Kim are of Korean heritage (United Ex. 2).

116. *Andrew Kimm* is proposed to be the General Manager of the Riverside television station. His duties will include providing direct supervision to the department heads, working with attorneys and consulting engineers, and other duties which should be carried out in the capacity of a general manager (Tr. 2614-15).

117. Mr. Kimm resides in Manhattan Beach, California, which is located about 50 miles from Riverside

[27] Andrew and Rachel Kimm are husband and wife (United Ex. 2).

[28] Mr. Han was added as a principal after the "B" cut-off date and has been disregarded for the purposes of the comparative issue herein (Tr. 2447).

(United Ex. 3, p. 1; Tr. 2699). Although he has lived in the Los Angeles area since 1966, Mr. Kimm has never lived in Riverside (United Ex. 3, p. 1; Tr. 2699). Should United be awarded the construction permit, he will move his residence to Riverside and work full-time at the station (United Ex. 3, p. 1).

118. Since April 1977, Mr. Kimm has owned and operated Traders International, an import-export company in Manhattan Beach (United Ex. 3, p. 1). If the United application is granted, Mr. Kimm will hire a manager to run this business (United Ex. 3, p. 1; Tr. 2623-24). From 1967 to 1977 Mr. Kimm was the publisher and owner of the Korean American Herald, a bilingual (Korean and English) newspaper published weekly in the Los Angeles area (United Ex. 3, p. 1, 2). Mr. Kimm has no broadcast experience (Tr. 2617). Mr. Kimm is a member of the Los Angeles Reformed Church and has been a deacon of that Church since 1979 (United Ex. 3, p. 2). Mr. Kimm does not presently participate in any civic activities in Manhattan Beach, Los Angeles or Riverside (Tr. 2700).

119. Mrs. Kimm will work 40 hours a week at the station in her job as Personnel Manager (United Ex. 4, p. 1). She will evaluate and maintain the personnel files (Tr. 2633), develop employee functions and duties (Tr. 2633, 2822), recruit and interview all job applicants (Tr. 2632, 2822, 2859, 2861-2862), and assign them to their positions (Tr. 2988), arrange for the training of new employees (Tr. 2822), cooperate with department heads in evaluating employee performance (Tr. 2633, 2992-3), and make recommendations to the General Manager regarding the termination of employees (Tr. 2637, 2992).

120. Mrs. Kimm is a graduate of Seoul National University, Seoul, Korea (Tr. 3092-3093). Her native language is Korean, but she is also fluent in Japanese, and

can speak Chinese on a conversational level (Tr. 2632, 3049). Her knowledge of the English language is somewhat limited.[29] Currently, in the operation of her boutique, she uses English every day, in conversations with her customers most of whom are English speaking persons, and in the management and operation of the store (Tr. 2876, 3098-3099, 3108). She also speaks English with her children and with her neighbors (Tr. 3108). She is currently enrolled in English language courses at the South Bay Adult School in Manhattan Beach, California. She is attending classes for three hours per day, five days a week, and believes that she will be fluent in English by the time this proceeding is concluded (Tr. 2852, 2993-2996). If she finds that she needs assistance in the performance of her duties as Personnel Director, she will hire a part-time interpreter or use assistants who will be bi-lingual or use her husband as an interpreter (Tr. 2632, 2994-2995, 3049-3050). At present, she would need some assistance in interviewing English-speaking job applicants (Tr. 3050). Mrs. Kimm stated that the personnel records at the station will be maintained in English and that while she may need some assistance in maintaining reports, she can read English much better than she can speak it (Tr. 3050-3051).

121. Mrs. Kimm now lives in Manhattan Beach with her husband, and has lived in the Los Angeles area since 1966 (United Ex. 4, p. 1; Tr. 2981). She will move to Riverside and work full-time at the station if the United application is granted (United Ex. 4, p. 1). Mrs. Kimm currently owns and operates a ladies' boutique in Lawndale, California, which is near Manhattan Beach. If the United application is granted, she intends to sell the boutique (United Ex. 4, p. 1; Tr. 2981). From 1967 until 1977, Mrs. Kimm was employed as Personnel Manager of the Korean-American Herald, the weekly bilin-

[29] The cross examination of Mrs. Kimm was conducted largely through the aid of an interpreter.

gual newspaper published by her husband (United Ex. 4, p. 2). The record reflects that her past work as Personnel Director was with Korean-speaking employees (Tr. 2630).

122. Since 1977 Mrs. Kimm has been a member and a deacon of the Los Angeles Reformed Church, where she is active in the Women's Society (United Ex. 4, p. 2). Also, at various times during the past five years Mrs. Kimm has been employed on a part-time basis as a counselor for the Asian-American Women's League in Los Angeles. She intends to continue to make herself available to the League as a counselor to the extent such activities will not interfere with her work at the station (United Ex. 4, p. 1).

123. *Nicholas Chun* is proposed to be Sales Manager at the station (United Ex. 5, p. 1). His duties will include actual selling of time (Tr. 2640, 2923) and supervising the sales staff (Tr. 2641). He will have no responsibilities for hiring and firing (Tr. 2895). He estimates he will be selling outside the station about half of his time (Tr. 2923-24).

124. Mr. Chun has lived in Los Angeles since 1974 (United Ex. 5, p. 1). He estimates that his residence is between 60 and 80 miles from Riverside (Tr. 2913), and he hopes to keep his residence in Los Angeles, although he stated that he is willing to move to Riverside if necessary (Tr. 2912, United Ex. 5, p. 1). He intends to work full-time at the station (United Ex. 5, p. 1).

125. From 1976 to 1980, Mr. Chun was a real estate salesman in Los Angeles. From April 1980 to April 1982 he was the sole proprietor of English Shoes and Chun's, Inc., a retail shoe store in Los Angeles. He currently manages a gasoline station in Culver City, California and also works as a real estate broker on a part-time basis (United Ex. 5, p. 1). If the United application is granted, Mr. Chun proposes to give up his service station

job, but he expects to continue to work ten hours a week in the real estate business (Tr. 2898). Since 1974 Mr. Chun has been a member of the Korean Community Association in Los Angeles. Between 1977 and 1979 he served on the board of directors of that organization. He has been a member of the Korean Pharmacists Association of Southern California since 1974 and has served on its board of directors since 1976 and as its President between 1978 and 1980. Mr. Chun has been an elder of the Young Nak Presbyterian church in Los Angeles since 1977 (United Ex. 5, p. 2).

126. *Sam A. Digati* will work at the station at least 40 hours a week (United Ex. 6, p. 1). As Public Relations and Public Service Director, Digati will contact community leaders and organizations in order to ascertain what the station should be doing for the community and also to make sure that the community is aware of the station (Tr. 2704). Digati will also contact organizations in order to make available to them the opportunity to broadcast public service announcements, and will have a role in preparing public service announcements to be aired over the station (Tr. 2807-2810). Dr. Digati will not have a supervisory role over other personnel at the station (Tr. 2694). In addition, Mr. Kimm and the program director will make the decisions about programming (Tr. 2704-05).

127. Mr. Digati has lived in Riverside for 28 years (United Ex. 6, p. 1). He proposes to work full-time at the station should the United application be granted (United Ex. 6, p. 1). Mr. Digati is at the present time the Treasurer and a director of Parkview Community Hospital, a position which he intends to continue (Tr. 2558-59). His duties with that organization take three to three and one half hours per month (Tr. 2559). Also, Mr. Digati is a member of the Riverside City Council, which takes between 10 and 30 hours per week on a regular basis (Tr. 2560). He has no intention to resign at the

present time from the City Council (Tr. 2562), and fully intends to finish his present term which lasts for three more years (Tr. 2564). Furthermore, Mr. Digati admitted on the witness stand that he had given thought to and discussed with other members of the community the idea of running for Mayor when his present City Council term expires. The job of Mayor in Riverside is a full-time salaried position. When questioned about his intentions, Mr. Digati refused to rule out the possibility that he would run, even if the United application were granted (Tr. 2565-67). Mr. Digati presently works as manager and secretary of the B. P. O. Elks Lodge in Riverside and will resign that employment if the United application is granted (United Ex. 6, p. 1).

128. Mr. Digati has served on the Riverside City Council for a total of 10 years, and his duties have included serving as Chairman of the City's Economic Development Committee, President of the Economic Development Corporation of Riverside, Chairman of the City Legislation Committee, and Chairman of the Planning Commission. He was the Riverside City Delegate to the Association of Governments. He has been a member of the Arlington Kiwanis Club and served on its board of directors. He has been a member of the Advisory Committee of the Riverside Police Explorer Post. He is a life member of the Riverside County Association for Retarded Children and has served as its director. Mr. Digati is a Regional Director for "We Turn In Pushers" ("WE TIP"), an anti-crime organization. In 1976 he was honored as the statewide man of the year by that organization. He has received the Citizen of the Year Award from the Boy Scouts of America, Inland Empire Council. He is a member of the Veterans of Foreign Wars, the American Legion, Elks, Knights of Columbus, and Loyal Order of Moose. He is a charter member of the Friends of Loma Linda University, La Sierra campus. He has served as a member of the Riverside Boy's Club

and was President of the Queen of Angels PTA. He has also been a member of the Riverside Chamber of Commerce and has served on its board of directors. He has been a member of the local Hispanic Chamber of Commerce and he also belongs to the La Sierra and Arlington Chambers of Commerce. He has been President of each of these two district Chambers. He has received the volunteer of the Year Award from Riverside Chambers of Commerce (United Ex. 6, pp. 2-3).

129. *Bong Koo Kim* is proposed to be Program Director at the station (United Ex. 7, p. 1). His duties will include responsibility for all programming except commercials (Tr. 2645), supervising program production employees (Tr. 2645-46, 2950), and assisting the procurement of programming (Tr. 2650, 2940).

130. Mr. Kim resides in Temple City, California, and has lived in the Los Angeles area since 1967 (United Ex. 7, p. 1). He is currently unemployed and will move to Riverside and work full-time at the station if the application of United is granted (United Ex. 7, p. 1).

131. Mr. Kim has been involved in the field of broadcasting for more than 25 years. He was among the first on-air performers on television in Korea, serving in that role as early as 1956. From 1968 to 1972, he worked for the Korea Broadcasting Service, a Los Angeles company which purchased time on KBBI(FM) (now KLVE), Los Angeles, for Korean language programming. His duties included program editing and newscasting (United Ex. 7, p. 1). From 1972 to 1976, he was a newscaster for Korean TV Productions, a television production company. In 1976 to 1978, Kim was General Manager of the Korean Broadcasting Company (KBC). During that period, KBC provided the programming service on the sub-carrier channel of KMAX(FM), Arcadia, California, and Kim was involved in a broad range of broadcast-related areas, including the production and scheduling of programs, newscasting, and management of personnel

(United Ex. 7, pp. 1-2; Tr. 2947), KBC broadcast over an FM sub-carrier and leased special receivers to its listeners (Tr. 2946). This was a 24-hour operation and included music, news, English language lectures, legal programs, and drama (Tr. 2947-2948). From 1978 to 1981, Kim was General Manager of the World Wide Broadcasting Network, a Los Angeles company which produced television programming and purchased time on television station KSCI, San Bernardino, and KHWY-TV, Los Angeles, for the broadcast of these programs (United Ex. 7, p. 2). As General Manager of World Wide, Kim personally supervised the programming and production staff, cameramen and newswriters (Tr. 2965-2966). He assumed overall responsibility until the broadcast was complete (Tr. 2966). He also did some newscasting (Tr. 2947), wrote copy for the newscasts (Tr. 2955), and edited tapes (Tr. 2947).

132. Mr. Kim has been a member of the Los Angeles Central Lions Club since 1980, and has served as First Vice President. In 1977 he received a certificate of merit from the Los Angeles Human Relations Commission. In 1973 and 1977 he was given an award by the Korean Association of Southern California in recognition of his contributions to the development of the Korean community in California (United Ex. 7, p. 2).

## CONCLUSION

*Issue 2—Bethel Financial Qualifications*

133. Bethel's cost of constructing and operating its proposed station through the first three months on the air will be $1,408,550. Bethel has available $1,519,656 consisting of existing capital ($10,000), deferred equipment credit ($759,656), and a bank loan commitment ($750,000). Thus, Bethel is financially qualified. Issue 2 is resolved favorably by Bethel.

*Issue 3(a) to (c)—Channel 62 Legal Qualifications*

134. A legal qualifications issue was specified against Channel 62 on the basis of missing information in Section II of its application. Missing was the Table I and Table II information for the officers, directors and shareholders of Channel 62, Incorporated and the Chambers which holds 100% of the stock of Channel 62, Incorporated. Also missing was the information required by questions 17(1) through 17(4) of Section II relating to the other media interests of such officers, directors and stockholders of Channel 62, Incorporated and the Chambers. Channel 62 has supplied the missing information. The issue will be resolved in favor of Channel 62.[30]

*Issue 3(d) to (f)—Channel 62 Financial Qualifications*

135. Channel 62 will require $1,285,643 to construct and operate the proposed station for three months. Channel 62 proposes to rely on $150,000 from its limited partners and a bank loan in the amount of $2,000,000 from the Riverside National Bank. Channel 62 has shown the availability of $150,000 from its limited partners. However, the proposed bank loan cannot be credited. Neither

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[30] The findings establish that two of the Chamber's board members, Howard Fisher and Bart Singletary, are stockholderse in a corporation which is the licensee of an AM station in Riverside, California. In addition, another Chambers board member, Tomas Rivera, is a director of the Times Mirror Co., which holds interests in seven television stations. It is urged that Channel 62 is in violation of Section 73.636(a)(1) and (a)(2) and should be disqualified. The argument is rejected. The parties did not request a Section 73.636 issue and it is too late to advance such a proposition. *Commercial Radio Institute, Inc.*, 78 FCC 2d 1016 (Review Board 1980) is inapposite since a Section 73.636 issue was specified in that case. In this connection, with respect to Mr. Fisher's and Mr. Singletary's interest, the parties have not demonstrated that the UHF exception specified in Note 8 to Rule 73.636 is not applicable. With respect to Mr. Rivera's holding, any grant to Channel 62 will be conditioned on his withdrawal as director of the Times Mirror Co. or of the Chambers.

the original bank letter or the two follow-up letters provide reasonable assurance of the availability of the loan. Riverside bank's letter stated that it would "consider participating in a loan of $2,000,000" provided several conditions were met (Letter dated January 29, 1982). The bank never stated that it would make a loan under certain conditions, only that it would consider doing so. A present firm intention to make a loan, future conditions permitting, is the essence of the "reasonable assurance" standard. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166 (1980). The bank letter obtained by Channel 62 does not express a present, firm intention to make a loan and, therefore, does not satisfy the "reasonable assurance" standard. See *Boyd, Crosby N.*, 57 FCC 2d 474, 489 (1976); see also *Town & Country Radio, Inc.*, 53 FCC 2d 401, 403 (Rev. Bd. 1975). *Multi-State Communications, Inc.* v. *FCC*, 590 FCC 2d 1117, 1119 (D.C. Cir. 1978) does not require a different result. Unlike the letter here the bank's statement there that it was "willing to lend" the requested funds indicated a present firm intention to make the loan. In addition, the Riverside bank's lending limit is $600,000 and any loan is limited to that amount unless the bank can obtain "additional participants willing to accept the proposed terms" (Letter dated January 29, 1982). The Riverside bank has not identified its participating banks. More important, neither Channel 62 or the Riverside bank have submitted letters from other banks confirming their willingness to share in the loan. In the absence of evidence demonstrating that other banks would be willing to participate in the loan with the Riverside bank, there is no reasonable basis for concluding that the Riverside bank will be able to make the full loan to Channel 62. See *CBS, Inc.*, 49 FCC 2d 1214, 1228-29 (Rev. Bd. 1974); *Lamar Life Broadcasting Co.*, 26 FCC 2d 112, 115 (Rev. Bd. 1970); *TVUE Associates, Inc.*, 5 FCC 2d 419 (Rev. Bd. 1966); see also *Wadeco, Inc.*, 628 F.2d 122, 124 (D.C. Cir. 1980). Since Channel 62 has shown the avail-

ability of only $150,000, far short of the necessary $1,285,643, it is financially disqualified.

*Issue 4—United Financial Qualifications*

136. United will require $2,182,550 to construct and operate the proposed station for three months. United proposes to rely upon deferred equipment credit of $877,500 (not contested) and a $2,000,000 loan from the West Olympia Bank. As was the case with Channel 62, the bank letter cannot be credited. The proposed loan is well beyond the legal lending limit of the West Olympia Bank. The bank's credit limits are approximately $150,000 to $160,000 for unsecured loans and $300,000 for secured loans. Thus, in order to make the loan, the bank would have to syndicate it among several other banks. No other banks, however, have even been contacted by the West Olympia Bank for this purpose. In the absence of any showing whatsoever that other banks would be willing to participate in the loan with the West Olympia Bank, there is no reasonable basis for concluding that the West Olympia Bank will be able to make the full loan in question to United. See *CBS, Inc., supra*; *Lamar Life, supra*; *TVUE Associates, supra*; *Wadeco, supra*. This is particularly clear here, where there is no evidence that the bank has ever managed a participatory loan of any kind let alone one of this magnitude [31] and where there can be little or no first-lien security against the station's assets because United's equipment supplier would have a first lien on its equipment. Under these circumstances, the West Olympia bank's expression of confidence in its ability to syndicate a loan to United is not sufficient.

137. United argues that it need not show that other banks are willing to participate in the loan. According

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[31] On an unsecured basis, the West Olympia Bank could not supply even one-tenth of the funds needed by United and even on a secured basis, the bank could provide less than one-sixth of the amount required.

to United, all that is required of an applicant to establish reasonable assurance of the availability of the loan is evidence that the bank is aware that the loan will require participation of other banks and that this is standard banking practice. Contrary to United's contention, *Lamar Life, TVUE Associates* and *Wadeco* make clear that evidence of the willingness of other banks to participate in the loan is also necessary. Further, there is no basis for United's assertion that a financial issue was added in *CBS, Inc.* solely on the basis of the bank's failure to acknowledge that the loan would require participation of other banks. The Board's specific reference to the showings made in *Lamar Life* and *TVUE Associates* indicates that its holding is not so limited. In addition, *Cherokee Broadcasting Co.*, 8 FCC 2d 138 (Rev. Bd. 1967) and *Adirondack Television Corp.*, 5 FCC 2d 623 (Rev. Bd. 1966), cited by United, which preceded *CBS, Inc.*, are factually dissimilar from the instant case and do not support its position. Adirondack involved a $500,000 loan; the bank's lending limit was $260,000. In denying the addition of an issue in Adirondack, the Board did not reach the question of the adequacy of the applicant's showing. The Board based its denial on procedural deficiencies and on the ground that the loan commitment had been previously considered by the Commission prior to designation, citing *Fidelity Radio, Inc.*, 1 FCC 2d 661 (1965). In this connection unlike *Adirondack*, a financial qualifications issue was specified here in the Designation Order. Cherokee involved a $14,000 loan; the bank's lending limit for unsecured loans was $10,000.[32] In response to the request for an issue, the bank revised its letter, stating that to avoid exceeding the legal loan limit other banks would participate or the note would be assigned. Also, the bank letter stated that the bank's board of directors had approved the procedure

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[32] Petitioner contended the depreciated value of Cherokee's AM equipment was only $9,165,500, insufficient to constitute security for the bank loan.

for handling the proposed loan to Cherokee. The Board denied the request for an addition of an issue on the basis of these specific facts, which bear no resemblance to the facts here, and also because, like *Adirondack*, the Commission had previously considered the loan commitment. Since, the $2,000,000 bank loan can not be credited, the funds available to United fall far short of the amount required ($2,182,550). Accordingly, it is concluded that United is not financially qualified.[33]

*Issue 5—Sunland, Bethel Air Hazard*

138. The FAA has issued determinations of "no hazard" with respect to Sunland's and Bethel's proposed tower. Issue 5 is resolved in favor of both applicants.

*Issue 6—Bethel Violation of Section 73.3514*

139. The omissions from Bethel's application resulted from two factors. The first, and most egregious, was the abandonment of Bethel by its original communications counsel. This abandonment was exacerbated by the facts that it was done without notice to Bethel and that it took place at a time which, not known to Bethel, was critical to the proper preparation of the application. The other factor was that Bethel had to rely on its consulting engineer in regard to the technical portion of its application. It was this portion from which there were the most substantial omissions. In any event, Bethel promptly and completely corrected all omissions as soon as they were brought to Bethel's attention. Also, there has been no evidence of wilfulness or intent to conceal on the part of Bethel, nor is there any possible motive for Bethel to do

[33] The parties also argue that United has failed to establish its financial qualifications because no evidence has been presented that United and its principals could provide collateral for the loan and the bank letter fails to state any knowledge of United's financial condition or the financial condition of its principals. These contentions are rejected since it appears that the bank letter taken together with the testimony of various bank officials satisfies the requirements set forth in *Multi-State, supra.*

so. Further, Bethel's unintentional and inadvertent omissions, and the reasons therefore, have been fully explained. Under the circumstances, no comparative demerit is warranted. See *Kenneth J. Crosthwait*, 79 FCC 2d 191 (1980); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944 (Rev. Bd. 1982).

*Issue 7—Channel 62 Violation of Section 73.3514*

140. The Channel 62 application as filed did not contain information required by Section II of FCC Form 301. Information concerning the officers, directors and shareholders of Channel 62, Incorporated and the Chambers was missing. Also missing was information required by questions 17(1) through 17(4). The necessary information was supplied in amendments dated July 12, 1982 and August 13, 1982. There is no evidence that Channel 62 intended to conceal or mislead the Commission and no motive for doing so is apparent. However, since the material withheld is of decisional significance and in light of the considerable delay in supplying the information even after it was noted as missing in the *Designation Order*, a slight comparative demerit is warranted.

*Issue 8—Channel 62 Violation of Section 73.3526*

141. On January 12, 1982, Mr. Bantle[34] was denied access to the Channel 62 public inspection file kept at the offices of the Chambers. First, Mr. Bantle was told to return later in the day by Chambers' employees who were unfamiliar with the existence of the file. When he returned, Mr. Bantle was denied access to the file by Mr. Pick, a principal of Channel 62, who insisted on knowing what organization Mr. Bantle represented. Mr. Pick also apparently jumped to the conclusion that Mr. Bantle had earlier misrepresented himself as being from the FCC and was so concerned about that possibility that

[34] Mr. Bantle was an employee of a principal of Pan-Pacific Broadcasting, Inc., which at the time was a competing applicant in this proceeding.

he refused to let Mr. Bantle view the file that day. Mr. Pick asked Mr. Bantle to return another day after he called his counsel in Washington. Mr. Pick and the Chambers employees violated Section 73.3526 of the Rules. It has long been established that applicants may require personal identification (names and addresses) of people wishing to inspect the public file. They may not, however, require people to identify the organization they represent. *WBRN, Inc.*, 32 FCC 2d 729, 730 (1971). Nor may applicants require that members of the public make an appointment in advance or return at another time. *Availability of Locally Maintained Records*, 28 FCC 2d 71 (1974). Although these violations by Channel 62 do not rise to the level of intentional misconduct or wanton neglect which would justify disqualification, the violations go beyond simple inadvertence. A slight comparative demerit is warranted.

*Issue 9—EBC Staffing*

142. EBC proposes to operate its television station 12-13 hours a day, 7 days a week, with 6 full-time and 2 part-time employees. At issue is whether EBC has demonstrated the ability to effectuate its operational and programming plans with its proposed staff. "[T]he Commission has no rigid rules or standards prescribing personnel or staffing requirements; there is only a general one that there be a reasonable likelihood that an applicant can effectuate its proposed operation with its staff." *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291, 292-93 (Rev. Bd. 1974).

143. EBC has not met that general standard. Its operation of the proposed Riverside station[35] is predicated on the ability of Ms. Keep to supervise all station personnel as general manager, perform the functions of station manager, news and public affairs director and pro-

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[35] The proposed station is the first television station licensed to Riverside, a community of more than 170,000.

gram director, produce a nightly 10 minute news show, and host a weekly 1 hour talk show while undertaking ascertainment, representing the station in the community, gathering information for her news and public affairs programming, editing, producing and writing scripts, scheduling the station's programming, answering telephones, preparing agendas for other personnel and doing other menial talks. It is simply incredible that Ms. Keep, who has no broadcast experience, will be able to carry on all these duties.[36]

144. Furthermore, the proposal for engineering personnel provides little or no flexibility and is so tightly structured as to be highly vulnerable to any of a wide variety of likely mishaps. The absence of an engineer due to illness or other cause would seriously jeopardize the station's capacity to produce the proposed local programs and commercials. Ettlinger's only contingency plan in this regard—to expand the part-time engineer's work load by eight hours—would not cope with any absence of more than one day in a given week. Even brief absences in the course of the workday could vastly complicate if not destroy program production which must be effectuated in the space of one rigidly predetermined half-hour on weekday afternoons. The proposed staff would not be prepared to respond to fast breaking events occurring in Riverside. In this connection, plans for covering urgent local events were not considered in the staff proposal. Technical matters would often be in the hands of only one engineer. Even absent a technical emergency, this situation places unnecessary reliance on the reliability and competence of one employee. The narrowness of Ettlinger's anticipated production schedule would likely be a serious obstacle to its ability to work with the most active and significant of the Riverside com-

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[36] Compare *Bisbee, supra,* involving a much smaller community where the staffing proposal for an FM station included a principal with extensive broadcast experience.

munity leaders. It is unlikely that three or four community leaders each week can be assembled promptly at 6:00 p.m. and their discussion immediately taped. At best, little more than 15 minutes of discussion could be recorded between 6:00 p.m. and 6:30 p.m., since news taping and editing would have to be done at the same time. Thus, the community participants would have to present themselves three or four times at 6:00 p.m. in order to produce an hour long talk show. At no time on the weekends will there be an engineering presence sufficient to work on producing the talk show. In response to specific questions concerning the manner in which the staff as proposed could possibly produce the talk show, Ms. Keep referred to "fluctuating" schedules. Unfortunately the present schedule, although deficient, is already contrived so as to maximize the engineer overlap necessary for production. The obvious truth is that at least one more engineer would be required at the station to assure production of the talk show. In addition to the deficiences discussed, *supra*, EBC concedes that it has overlooked a necessary secretary/receptionist in its staffing plans.

145. The burden of proof on the staffing issue rested with EBC. Contrary to EBC's contention, the bare assertion that the proposed proposal represents a starting staff and can be expanded in the future, if necessary, is insufficient to resolve the issue in its favor. *Clarkston Broadcasters*, 12 RR 2d 1203 (1968). It is concluded that EBC has not shown a reasonable likelihood that its staffing proposal is sufficient to the task of operating the proposed station. EBC must be disqualified on this ground. See *Chapman Radio and Television Co.*, 19 FCC 2d 157, 162-63 (Rev. Bd. 1969).

*Issue 10—Family Violation of Section 73.3514*

146. Two amendments to the Family application were not placed in the Family public inspection file in a timely manner. These amendments were not sent by Family's

counsel to Mr. Dalton for forwarding to Family's public file as had been arranged for materials required to be placed in the file. While Mr. Dalton could have acted more diligently to request the amendments from Family's counsel for forwarding, he did not do so because he did not realize at this time that all amendments to an application are required to be placed in the public file and he assumed that if the particular amendments in question were required to be filed, his counsel would have forwarded them to him. Once Family was apprised that its public file was incomplete, the missing amendments were placed in the file and the file has been maintained complete, up-to-date and intact from that point. Since there is no evidence of an intent to conceal information or that a member of the public was harmed and in light of the *de minimis* nature of the violation, a comparative demerit is not warranted.

*Comparative Issue* [37]

147. The comparative issue must be decided in accordance with the *Commission's Policy Statement on Comparative Broadcast Hearings* (Policy Statement), 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, i.e., (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communication.

*Diversification of Mass Media*

148. KIST, Sunland, Bethel and United and their respective principals own no media interests. EBC itself holds no media interests. EBC's 60% stockholder and President, Mr. Ettlinger, owns 23.18% of the license of station KUDO-FM, Las Vegas, Nevada. He holds debentures which if converted to stock, would increase his

[37] Notwithstanding their disqualification, the applications of Channel 62, United and EBC are considered herein.

ownership interest in KUDO-FM to 47%. Mr. Ettlinger is a minor (6.37%) shareholder in station KDON/KDON-FM, Salinas, California and KBBQ/KBBY(FM), Venture, California.[38] Under the diversification criterion, media holdings in the proposed community of license are generally of most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. *Policy Statement,* 1 FCC 2d at 394-5. Because Mr. Ettlinger's interests are less than controlling and the radio stations are not within the proposed service area, EBC will be given a slight comparative demerit *vis-a-vis* Sunland, KIST, Bethel and United.

149. Channel 62, the applicant, and its general and limited partners have no media interests. However, certain past and present directors of the Chambers, which holds 100% of the stock of Channel 62, Incorporated, one of the two general partners do have media interests. Messrs. Richter, Fisher and Singletary are owners, officers and directors of Inland Empire Broadcasters, licensee of radio station KPRO(AM), Riverside, California and KWTC/KZNS(FM), Barstow, California. Additionally, Mr. Rivera is a member of the board of directors of the Times Mirror Company, owners of newspapers and television stations. Ordinary these media interests, particularly the holding in the proposed city of license, would warrant a substantial diversification demerit. See *Colorado West Broadcasting, Inc.,* 57 FCC 2d 526 (Rev. Bd. 1976). However, the unique facts in this case justify a demerit of less magnitude. Thus, the overall policy of Channel 62, Incorporated is directed by its five-member board of directors. None of the individuals discussed *above* are presently or intend to be members of the board. In fact, Channel 62 has represented that they will not

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[38] Mr. Ettlinger also owns and is President of Medallion TV Enterprises, Inc. a TV program distributor, and Jett Advertising Advertising Agency. Neither of these interests constitute mass media interests for purposes of comparative evaluation. See *Morris, Pierce & Pierce,* 88 FCC 2d 713, 723-24 (Rev. Bd. 1981).

participate in any way on any matter involving the pending application or participate if a license is ultimately granted to Channel 62. Further, the Chambers, which elects the five member board, typically has approximately forty-two members. Even assuming Channel 62 had not represented the four media interest holders would not participate in its affairs, their influence in such a large body would clearly be negligible. Finally, the Riverside media interest is in a different service than the facility involved in this proceeding. On the basis of these facts, only a very slight demerit is warranted *vis-a-vis* Sunland, KIST, Bethel and United.

150. Family has no media interests. Mr. Dalton, one of its principals, had a very brief limited partnership interest in a construction permit for KSPR(TV), Springfield, Missouri. In light of the circumstances described *below*, this interest will not be counted against Family. Following the B cut-off date, Mr. Dalton became a limited partner in the proposed assignee of the construction permit for KSPR(TV). Prior to Commission approval, Mr. Dalton agreed to sell his interest. However, prior to consummation of the sale, the Commission approved the assignment. Both the acquisition of the interest and its divestiture were timely reported in one single amendment to the Family application. On the basis of these facts, Mr. Dalton's interest should not be treated less favorably than an applicant who, prior to the B cut-off date, signals his intention to dispose of a media interest. See *WHW Enterprises, Inc.*, 89 FCC 2d 799, 813 (Rev. Bd. 1982). Ms. Freeman's 2% interest in High County Broadcasting, Inc., also will be discounted since she has no ownership interest nor any position of managerial significance with Family. In summary, KIST, Sunland, Bethel, United and Family are even. EBC warrants a slight demerit and Channel 62 a very slight demerit *vis-a-vis* the other five applicants.

*Best Practicable Service To The Public Integration*

151. In evaluating the applicant's integration proposals, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-today performance be closely associated" (*Policy Statement, supra,* at 395). The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Also, no integration credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company,* 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied,* FCC 79-397, released June 22, 1979. Similarly, consultative positions will be given no weight. *Policy Statement,* 1 FCC 2d at 395. Thus, no integration credit will be awarded where a principal proposes to work in a nonmanagerial position. *Bradley, Hand and Triplett,* 89 FCC 2d 657 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.,* 88 FCC 2d 1090, 1095 (Rev. Bd. 1982); *New Continental Broadcasting Co.,* 88 FCC 2d 830, 839 (Rev. Bd. 1981).

152. KIST will receive 37.49% full-time quantitative integration credit. Mr. Fox (8.33%), Ms. Cooper (4.17%), Mr. Butler (8.33%), Mr. Austin (8.33%) and Mr. Koch (8.33%) will work full-time in management positions at the proposed station. KIST will receive no integration credit for the proposed part-time (20 hours) participation of Mr. MacCauley (12.5% interest) and Mr. Cogbill (8.33% interest) as sales account executives.

They will not perform management level functions in their role as salesmen.[39] *Bradley, Hand, supra*; *Scott & Davis, supra*; *New Continental, supra.* KIST's integration proposal is qualitatively enhanced in the following manner. Ms. Cooper is a female and a resident of Riverside. Ms. Cooper receives no credit for community involvement since her limited activities are purely social in nature. Mr. Austin is also a Riverside resident and has, to some degree been involved in civic activities. Mr. Koch resides in the proposed service area and is also involved, to some degree, in civic activities. Mr. Butler is also a resident of Riverside. He will receive no credit for civic involvement since such involvement ended in 1974. KIST claims minority enhancement credit on the ground that Fox is an Hispanic. Minority credit will not be awarded. Mr. Fox is not presumptively Hispanic because he does not have an Hispanic surname, nor does he claim to be Hispanic because his mother is Hispanic. The closest ancestor of possible Hispanic heritage is his paternal grandfather but this relative also apparently has the surname Fox, not an Hispanic surname. Further, Mr. Fox is not a fluent speaker of Spanish; Spanish was spoken only infrequently in his home by his father. Mr. Fox was born in this country, as were both his parents and he has no immediate relatives living outside this country. Moreover, Mr. Fox apparently does not belong to any Hispanic organizations in Riverside. Mr. Fox will receive a minor enhancement for future local residence. *Policy Statement,* 1 FCC 3d at 396; *Merrimack, supra.* Although KIST receives no integration credit for Mr. MacCauley's participation, KIST is entitled to slight residual credit since Mr. MacCauley is a local resident and pro-

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[39] Mr. MacCauley and Ms. Cooper are husband and wife. KIST argues that Mr. MacCauley's interest should be attributed to Ms. Cooper for integration purposes, citing the Review Board's decision in *Absolutely Great Radio, Inc.,* FCC 83R-9, released February 4, 1983. However, the Board's holding has been reversed by the Commission, *Absolutely Great Radio, Inc.,* FCC 83-464, released October 13, 1983.

poses to devote some time to station affairs. See *Midwest, supra.*

153. EBC will receive 20% full-time quantitative credit since Ms. Keep (20% interest) is proposed to work full-time as the station's general manager. EBC will receive no integration credit for Mr. Ettlinger's (60% interest) proposed part-time participation. Mr. Ettlinger proposes to work one day at the station. Mr. Ettlinger will hold no title and all management functions are to be performed by Ms. Keep. Mr. Ettlinger's statement that he will supervise Ms. Keep on his one day at the station is too nebulous to be credited as a management function. Further, Mr. Ettlinger's claim that he will spend 16 hours on behalf of the station acquiring programming must be discounted. Initially, it must be regarded as an employee type activity, rather than a management level position, since Ms. Keep is in charge of programming as well as all other aspects of the station's operation. In addition, Mr. Ettlinger's claim that he will spend 16 hours away from the station acquiring programming for the station is not supported. Mr. Ettlinger is currently a TV program distributor and it is not possible to determine whether the 16 hours will be spent acquiring programming for his TV program distribution business or the station. In this connection, Medallion, owned by Mr. Ettlinger, will supply the majority of the station's programming and the remainder will be acquired through barter arrangements. EBC's integration proposal is qualitatively enhanced by Ms. Keep's female status.

154. Sunland will receive 35% full-time quantitative integration credit for Mr. Soto's (35% partner) role as full-time general manager. The contention that Mr. Soto is not a true and actual owner of Sunland is rejected. It is true that Mr. Soto has not yet provided financial resources to Sunland to aid in the application and hearing process. However, assuming this factor is a crucial consideration in determining whether Mr. Soto is a true

and actual owner,[40] it must be remembered that Mr. Soto is required to pay back any advances to him from future station profits. Further, Mr. Soto is fully obligated to contribute proportionately to finance the construction and operation of the station. Thus, it is clear that Mr. Soto has a financial stake in the Sunland partnership. In addition, the provisions of the partnership agreement, discussed in footnote 19, *supra*, make clear that Mr. Soto will participate fully in the management and control of the station. Sunland will also receive 55% part-time integration credit for Mr. Hodin's (55% partner) proposed part-time participation (20 hours) directing the general administrative and financial aspects of the station. Sunland's integration proposal is qualitatively enhanced in that Mr. Soto is Hispanic, is a longtime resident of Riverside and has been heavily involved in civic and community activities. Also, Mr. Hodin proposes to move to the Riverside area. Sunland receives no prior broadcast experience credit since Mr. Hodin has never been involved in the day-to-day operation of a broadcast station.

155. Bethel will receive 33.33% full-time credit. Bethel is a non-stock corporation. Mr. Vaughn is one of the three members of Bethel's Board of Directors. Mr. Vaughn is proposed as the full-time General Manager of the proposed station with authority to make all day-to-day decisions affecting station operations and programming, subject only to the policy directives of Bethel's Board of Directors, of which he is a member. Mr. Vaughn will be treated like a participating owner in a commercial enterprize. As one of three directors of Bethel, he will be considered on the same basis as a 33.33% stockholder. *Farragut Television Corporation*, 8 FCC 2d 279 (1967);

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[40] Channel 62's Mr. Pick (Channel 62 Ex. 16 at 15, Bethel's Mr. Vaughn (Tr. 1360-61), Family's Ms. Kearney (Tr. 2364) and United's Mr. Digati (Tr. 2529-30) have also contributed no funds to their respective applicants for the costs of preparing and litigating their applications.

*Loyola University*, 12 RR 1017 (1956); *Las Misiones De Bejar Television Co.*, FCC 83R-10 released February 11, 1983. Bethel's integration credit is qualitatively enhanced by Mr. Vaughn's local residence and civic involvement.

156. Channel 62 will receive no integration credit. Mr. Pick is proposed as Channel 62's general manager. However, Mr. Pick, while one of two general partners of Channel 62, does not hold any ownership interest in the partnership or any of its various components parts and cannot be accorded ownership status. Even were Mr. Pick deemed to have some recognizable ownership interest, Channel 62 would receive no integration credit since Mr. Pick will be held to have committed himself to work only ten hours a week at the station. In its application, Channel 62 indicated Mr. Pick would devote "25%" of his time to the station. In response to interrogatories, Mr. Pick stated that he would devote approximately 10 hours per week to the operation of the station. In its hearing exhibits and in Mr. Pick's testimony, an attempt was made to expand his time commitment to twenty hours. Channel 62's attempt to improve its comparative position by offering evidence at variance with previous representations will not be allowed to succeed. The parties are entitled to rely on representations made in the course of discovery and Channel 62 will be held to such representations.[41]

157. Family seeks integration credit for Ms. Kearney, a Black female and asserted 95% stockholder,[42] who will

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[41] Channel 62 also proposed Betty Cox Johnson, a limited partner as an integrated principal. However, limited partners get no integration credit. *Absolutely Great Radio, Inc.*, FCC 83-464, released October 13, 1983, footnote 8. In addition, Ms. Johnson's testimony made clear that she would not have a decision-making role at the station. Her testimony was, therefore, stricken to the extent it proposed integration (Tr. 1330).

[42] Even if integration credit were awarded to Family, it could only be for the 80% stock ownership held by Ms. Kearney prior to the "B" cut-off date.

work full-time as the station's general manager. However, the facts surrounding the formation of Family and its participation in the application process, detailed in findings 104-112, *supra*, lead inevitably to the conclusion that Mr. Dalton, asserted 5% stockholder in Family, is the true and actual owner of the applicant and Ms. Kearney must be considered as having no ownership interest.

158. Ms. Kearney, the purported 95% stockholder, did not pay for her stock. Ms. Kearney also is not obligated to advance any funds for the prosecution of the application or the construction and operation of the station. All funds so far advanced, which totalled over $70,000 at the time of hearing, were advanced by Mr. Dalton, the purported 5% stockholder. For the funds needed for construction of the station, Mr. Datlon obtained a loan letter for $500,000 from the Commerce Union Bank, his primary bank, and where he maintains substantial funds. The inclusion of Ms. Kearney as a guarantor is devoid of meaning. Mr. Dalton did not even give the bank Ms. Kearney's financial statement since, as recited by Mr. Dalton, the bank was not interested in her financial situation. It is clear that the commitment letter was predicated solely on Mr. Dalton's financial status, that any subsequent agreement by the bank to loan money to Family will be wholly dependent on Mr. Dalton's financial picture at the time, and that if such loan is made, the bank will be looking solely to him for repayment if Family is unable to do so. Mr. Dalton also has agreed to provide a personal loan of up to $500,000 in case the bank loan proves inadequate to cover Family's costs.

159. In *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (Rev. Bd. 1978) *aff'd.* 86 FCC 2d 423 (1981), the Commission found nothing wrong with a controlling principal giving the gift of a 5% stock interest to a trusted former employee. A gift of 95% controlling interest is a totally different matter, particularly, where, as here, Mr. Dalton

met the recipient only once before and knew only because of his wife's association with her at a Paris design school. Mr. Dalton is an experienced businessman and entrepreneur. His willingness to accept a 5% ownership interest and assume all the financial risks is "inconsistent with human experience and normal business practice" *Henderson Broadcasting Co.*, 63 FCC 2d 419, 429 (Rev. Bd. 1973). The only plausible explanation is that Family's ownership structure is a facade to maximize Family's chances of winning the comparative hearing. In reality, control has and will continue to reside with Mr. Dalton.

160. Moreover, one of the most effective methods of control of any business is the control of its finances. *Heitmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937). There can be no doubt that Mr. Dalton has financial control of the corporation. As pointed out, *supra*, Family is dependent on Mr. Dalton for funds necessary for the prosecution, construction, and operation of the station. In addition, Mr. Dalton has in the past, and will continue to have complete control over the use of such funds. Riverside Family has a corporate bank account at the Commerce Union Bank in Nashville, Tennessee, the same bank where Mr. Dalton obtained the loan letter. Mr. Dalton set up the bank account. From approximately June 1981 until January or February of 1982, Mr. Dalton and an associate of his, one Dr. Crants, were the sole signatories on the corporate checking account, and both men have written checks on the account. Mr. Dalton and Dr. Crants share an office suite and are partners in at least two other television ventures. Sometime in the early part of 1982, Dr. Crants was removed as a signatory and Kearney was added, but Ms. Kearney could give no explanation as to why this was done. Although Ms. Kearney is currently a signatory on the account, she has written no checks on behalf of the corporation and Mr. Dalton has possession of the checkbooks. Thus, the fact that Kearney is now a signatory is merely an empty formality and has no bearing on the question of who has

financial control of the corporation. Not only does Mr. Dalton have possession of the checkbooks, he also has complete control over how much money will be deposited in the account and when it will be deposited.

161. The evidence at the hearing also establishes that Ms. Kearney has never exercised control of the corporation. The Family application states that Ms. Kearney and Mr. Dalton are directors, but there has never been a formal meeting of directors or any formal action by the directors. Moreover, there are no minutes concerning possible informal meetings held by telephone by Mr. Dalton and Ms. Kearney. There also were no meetings and no formal actions taken by Ms. Kearney and Mr. Dalton as stockholders of the corporation. Ms. Kearney is stated to be the President of the corporation, although there has never been any action by the Board of Directors electing her to that position. The record is completely devoid as to any duties she has performed as President of the corporation, but does show that Mr. Dalton has performed at least some of the duties reserved for the President by the by-laws, such as signing the corporation's stock certificates and executing contracts on behalf of the corporation. Mr. Dalton also established the corporate bank account and did not tell Ms. Kearney he made Dr. Crants a signatory. In this connection, no board of directors action was taken to establish the bank account or make Dr. Crants a signatory.

162. The findings discussed, *supra*, require the application of the corporate fiction-alter ego doctrine of Henderson, *supra*. In *Henderson*, the Review Board held that all *de jure* aspects of a corporate organization must be disregarded when failure to do so would enable the corporate device to circumvent the public interest, cause unfairness, or perpetrate inequities. In such circumstances, the stockholders may be treated as if the corporation does not exist. Similarly, in *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978), the Review Board awarded

no integration credit to two asserted partners for a similar reason. It held that the individuals were not in fact true and actual owners even though they would share in profits and losses, because a special partnership agreement vested control of the partnership in another person. The Review Board stated:

> It may be true . . . that applicants do structure their composition in a manner designed to achieve comparatice preferences based upon the *Policy Statement* and Commission precedent relating to the comparative criteria, and that such fashioning is not necessarily improper or otherwise inconsistent with the public interest. Nevertheless, it is patently evident that such structuring must conform with the substances—not merely the labels—of the comparative criteria . . . Simply put, no applicant is required to seek a comparative integration preference; it is perfectly free to operate a station on the basis of absentee ownership with supervision—but not control—delegated to employees. However, when an applicant chooses to seek a preference in a comparative hearing on the integration criterion, its proposal cannot be a facade. *Id.* at 7.

163. Under the principles of *Henderson* and *Berryville*, Ms. Kearney cannot be considered a true and actual owner of Family. To allow Family to claim an 80% integration credit would "make a mockery of the underlying objective of the integration criterion" *Henderson, supra,* 63 FCC 2d at 426. Family argues that the principles of *Henderson* and *Berryville* are inapplicable in the absence of a special corporate provision specifically undermining Ms. Kearney's purported controlling equity interest. The short answer is that there is no indication that Ms. Kearney has ever exercised control or that Mr. Dalton's minority interest has served as an obstacle to his exercise of control. Furthermore, a special corporate provision vesting control in Mr. Dalton

is unnecessary. Family overlooks the fact that one of the most effective methods of control of any business is the control of its finances. See *Heitmeyer, supra.* Mr. Dalton has total financial control of Family. By virtue of that fact, he is effectively running the corporation. Ms. Kearney can recommend a course of action but she is powerless to act without first obtaining Mr. Dalton's approval. In short, she possesses no ownership attributes; she is merely an employee of Mr. Dalton's. It is clear that is what the parties intended. Further, contrary to Family's assertion, the fact that Ms. Kearney will be general manager and Mr. Dalton will not have an active role does not support the award of integration credit. Family is merely proposing to operate the station "on the basis of absentee ownership with supervision—but not control—delegated to employees" *Berryville, supra,* 70 FCC 2d at 7. Therefore, Family receives no integration credit.

164. United will receive credit for 45% full-time quantitative integration. In this connection, the proposed integration of Andrew Kimm (20% interest), Nicholas C. Chun (20% interest) and Bong Koo Kim (5% interest) is supported and will be credited. United will not receive credit for Mrs. Kimm's (15% interest) proposed participation as Personnel Director. Her testimony and that of her husband indicate that her overall role is plainly non-managerial and cannot be credited.[43] See *Bradley, Hand, supra.* United will also not receive integration credit for Mr. Digati's proposed participation as Public Relations and Public Service Director. Mr.

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[43] It is also argued that Mrs. Kimm's integration credit must also be disallowed since at the present time she cannot communicate in English in any meaningful manner. The argument is rejected. Mrs. Kimm, a graduate of Seoul National University in Korea, is currently enrolled in English language courses. It is reasonable to assume that she will be sufficiently fluent in the English language to carry out her assigned functions by the time this proceeding is over. To argue otherwise is pure speculation.

Digati's role is clearly non-managerial. He will not have a supervisory role over other personnel at the station. In addition, Mr. Kimm and the program director will make the decisions about programming. Mr. Digati's principal function is to serve as "goodwill ambassador" to the community (See Tr. 2693-94) and no integration credit is warranted. See *New Continental, supra*; *Bradley, Hand, supra.* Mr. Digati's proposed integration must be rejected for another reason as well. He has no intention of resigning his post as City Councilman and refused to rule out the possibility of his running for Mayor of Riverside in three years. That office is a full-time salaried position. Mr. Digati has given thought to the idea of running for Mayor and has actually discussed the prospect with members of the community. The Commission's test has always required integration on a permanent basis. *Rockland Broadcasting Co.*, 36 FCC 303, 314 (1964). No comparative credit is given when work at the station lasts for some time but is uncertain after that point. *Gainesville Media, Inc.*, 72 FCC 2d 807, 814 (1978) (citing note 6 of the *Policy Statement*). United's integration proposal is qualitatively enhanced in that Messrs. Kimm, Chun and Kim are of Korean heritage and entitled to minority credit. In addition, Mr. Kimm and Mr. Kim propose to move to Riverside. Also, Mr. Kim is entitled to credit for past broadcast experience. Further, United receives slight residual credit for Mrs. Kimm's and Mr. Digati's proposed involvement. Mrs. Kimm is a member of a minority group and proposes to devote time to the station. Mr. Digati is not a member of a minority group. However, he is a Riverside resident, and has been deeply involved in community affairs. See *Midwest, supra.*

165. In summary, KIST receives 37.49% full-time quantitative integration credit, qualitative enhancement, and slight residual credit for Mr. McCauley. EBC receives 20% full-time quantitative credit plus qualitative

enhancement. Sunland receives 35% full-time quantitative credit, 55% part-time credit, and qualitative enhancement. Bethel receives 33.3% full-time credit plus qualitative enhancement. Channel 62 and Family receive no integration credit. United receives 45% full-time quantiative credit, qualitative enhancement plus slight residual credit for Mrs. Kimm and Mr. Digati. Sunland's proposal is the superior integration proposal. Both United and KIST propose greater full-time participation. However, neither proposes to integrate a majority of its stock ownership. The differential between KIST's and United's full-time integration proposals (37.49% and 45%) and that of Sunland (35%) is more than offset by the fact that only Sunland proposes to integrate a majority of its stock ownership (90%). Its proposal, unlike United's and KIST's, furthers the Commission goal of maximum ownership participation in station affairs. See *Policy Statement, supra*, at 395; *Pleasant Broadcasting Co.*, 40 FCC 2d 582, 587 (Rev. Bd. 1973); *Gilbert Group, Inc.*, 50 RR 2d 81, 92 (Rev. Bd. 1981). It is well established that qualitative attributes of participating owners may enhance the value of a integration proposal but cannot overcome clear quantitative differences. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). Moreover, Sunland's qualitative enhancement consisting of 35% minority involvement, long time residence and long time and outstanding involvement in civic and community affairs (Mr. Soto) and the proposal of the 55% partner (Mr. Hodin) to move to the Riverside area increases, rather than decreases, Sunland's advantage over United and KIST. Sunland enjoys a slight integration preference over United and a slight to moderate preference over KIST. As between United and KIST, United will be given a slight preference. Sunland also enjoys a moderate preference over Bethel (33.3% full-time), a moderate preference over Ettlinger (20%) and a moderate to

substantial preference over Family and Channel 62 (no integration credit).

*Final Comparative Evaluation*

166. Sunland, KIST, Bethel, United and Family are even under the diversification criterion. EBC warrants a slight demerit and Channel 62 a very slight demerit *vis-a-vis* the other five applicants. Sunland enjoys a slight integration preference over its nearest competitor, United and a slight to moderate integration preference over KIST, the third best applicant. It is therefore concluded that the public interest is better served by a grant of Sunland's application. The ranking of the applicants is in the following order: (1) Sunland, (2) United, (3) KIST, (4) Bethel, (5) EBC (6) Family (7) Channel 62 (which also receives slight comparative demerits for violations of Sections 73.3514 and 73.3526).[44]

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Sunland Communications Corporation IS GRANTED and the applications of KIST Corp., Ettlinger Broadcasting Corporation, Bethel Broadcasting, Inc., Channel 62, A Limited Partnership, Riverside Family Television, Inc. and United American Telecasters, Inc. ARE DENIED.[45]

/s/ Joseph Chachkin
JOSEPH CHACHKIN
Administrative Law Judge
Federal Communications Commission

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[44] Channel 62, EBC and United have been disqualified.

[45] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).